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THE LAW
OF
REAL ESTATE BROKERS

WITH 1917 SUPPLEMENT

A MANUAL, WITH FORMS INCLUDED, FOR THE USE OF
LAWYERS AND REAL ESTATE OPERATORS

BY
FRED L. GROSS
Of the New York Bar



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PREFACE.

In the course of a real estate practice extending over a number of years, the author has felt the need of some reasonably complete and conveniently arranged work on the law governing the transactions and relations of real estate brokers. The obligation, as well as the desire, to keep accurately informed, resulted in his accumulating a large amount of material relating to the subject. He was led to believe that this might be of use to other lawyers, and of practical value to real estate brokers as well. The present publication is the result.

In preparing this work the author has used the material collected for his own use, and has largely supplemented it by research and study specially devoted to producing from his original collection of notes a book which should accurately exhibit the law as it is.

In the selection of supporting authorities the author has endeavored to avoid the too common habit of dumping in authorities secured from anywhere and everywhere, leaving the reader to ascertain whether they affect the statement for which they are cited or not. What Pascal said concerning his "Provincial Letters" may be conscientiously claimed for these pages: "I did not make use of a single passage without having myself read it in the book from which it is cited, without having examined the subject of which it treats, and without having read what went before and followed, so that I might run no risk of quoting an objection as an answer which would have been blameworthy and unfair." Beyond this, by ample quotations, the author has sought, wher-

ever possible, to state principles in the language of the courts, rather than substitute his own language, thus presenting what the courts have really said, instead of what the text writer says they have said.

The author believes the book will be of direct and material value to the real estate broker. The maxim impresses upon us the fact that ignorance of the law excuses no one. In other words, everybody is supposed to know the law. The real estate broker may therefore find a service rendered him in these pages which place before him much legal knowledge directly affecting his vocation.

It must be borne in mind, however, that the present volume is not intended to make the broker his own lawyer. It will inform him on many important details of his calling, a knowledge of which will tend to prevent mistakes and lawsuits. It should also enable him to so conduct his business transactions that when litigation cannot be avoided he may place in his lawyer's hands a just and intelligent cause. But it will not qualify the broker to perform the duties of an attorney, and when litigation threatens, the prompt employment of competent legal advisers is the course of safety and of wisdom.

FRED L. GROSS.

189 MONTAGUE STREET,
Brooklyn, N. Y., November 1, 1910.

TABLE OF CONTENTS.

PART I.—POWERS, AUTHORITY AND RIGHTS OF BROKER.

Chapter I.—Introductory.

- § 1. Definition of Real Estate Broker.
- 2. Application of Term.
- 3. Functions of a Broker.
- 4. Definition of Terms.

Chapter II.—Who May Act as Broker. License Requirements.

- § 5. General Statement.
- 6. Married Women as Brokers.
- 7. " " " " State Laws.
- 8. Minors.
- 9. Partnerships.
- 10. Corporations.
- 11. License or Tax on Right to Act as Broker.

Chapter III.—Written and Oral Authority of Broker.

- § 12. General Statement.
- 13. Form of Authorization.
- 14. New York; Authority to Negotiate Sale.
- 15. " " " " " Loan.
- 16. New Jersey; Authority to Sell or Exchange.
- 17. California; Authority to Purchase or Sell.
- 18. Missouri; Authority to Sell.
- 19. " " " Negotiate Loan.
- 20. Nebraska; Authority to Sell.
- 21. Washington; Authority to Sell or Purchase.
- 22. Montana; Authority to Purchase or Sell.
- 23. Authority to Collect Rents.
- 24. Statute of Frauds as Affecting Brokers.

- 25. Agreements Not to be Performed within a Year.
- 26. Classification of Agreements Not to be Performed within a Year.
 - (a) Where No Time is Fixed.
 - (b) Agreements for More than a Year.
 - (c) Agreements for More than a Year, but Terminable upon Some Contingency.

Chapter IV.—Broker's Power to Sign Contract.

- § 27. General Statement.
- 28. Broker's Authority to Sign Contract.
- 29. Powers Conferred by Instructions to Sell Property.
- 30. " " " " Appointment as Agent.
- 31. Broker's Power to Contract as Affected by Statutory Requirements.
- 32. New York Rule.
- 33. New Jersey Rule.
- 34. Massachusetts Rule.
- 35. California Rule.
- 36. Illinois Rule.
- 37. Rule in Other States.
- 38. When Broker has Authority to Sign Contract.
- 39. Mere Employment Does Not Give Power to Contract.
- 40. Extent of Authority Ordinarily Conferred by Employment.
- 41. Dissenting Opinions as to Incidental Power to Contract.
- 42. Ratification of Contract Signed by Agent.
- 43. Liability of Agent for Signing Unauthorized Contract.
- 44. Formalities Where Agent has Authority to Sign Contract.
- 45. Authority to Cancel or Surrender Contract.
- 46. Enforcing Contract Made by Agent.

Chapter V.—Broker Acting for Both Parties.

- § 47. General Statement.
- 48. Broker Not to Act for Both Sides.
- 49. Acting for Both Parties a Breach of Contract.
- 50. " " " " Constitutes a Fraud.
- 51. The Rule Applies to Exchange of Property.
- 52. Acting for Both Parties with Their Knowledge.
- 53. " " " " Not Unlawful in Itself.
- 54. Broker Vested with No Discretion May Act for Both Parties.
- 55. Compensation of Broker Without Discretion.
- 56. General Rule as to Discretion.
- 57. Reason for the Rule.
- 58. How Question of Double Employment is Raised.

Chapter VI.—Broker's Right to Interest in Profits.

- § 59. General Statement.
60. Agent Must Act in Interest of Principal.
61. " " Not be Personally Interested.
62. " May Not Also Act as Principal.
63. " " " Make Secret Profits.
64. Broker's Employees Governed by Same Rules.
65. Rule Not Affected by Agent's Honesty of Purpose.
66. Act of Agent in His Own Interest Presumed Injurious.
67. " " " " " " " Voidable, but May be Rati-
fied.
68. Agent May be Personally Interested with Consent of Principal.
69. Broker Without Discretion as Disclosed Principal or Subsequent
Purchaser.
70. Broker May Not Lawfully Combine with Others to Secure Secret
Profits.
71. Person Sharing Benefits Liable though Unaware of Fraud.

Chapter VII.—General Authority of Broker.

- § 72. General Statement.
73. Agent's Authority to Receive Payment for Property Sold.
74. Broker's Power to Employ Other Brokers.
75. Renting Agents.
76. In General, Renting Agency Terminates on Death of Principal.
77. Agent's Right to Dispossess Tenants. New York Rule.
78. Insurance Brokers.

Chapter VIII.—Revocation of Broker's Authority.

- § 79. General Statement.
80. Termination of Agency by Mutual Consent.
81. " by Performance of Object of Employment.
82. " of Agency at Pleasure of Principal.
83. " by Principal after Lapse of Reasonable Time.
84. Limitations on Principal's Power to Terminate Agency at Pleasure.
85. Revocation of Agency by Principal Must be in Good Faith.
86. " Must be Timely.
87. Termination of Agency by Previous Sale.
88. Good Faith Necessary to Termination of Agency by Previous Sale.
89. Termination by Destruction of Subject Matter.
90. " by Bankruptcy.
91. " by Insanity.
92. " by Death.

- 93. Fraud of Agent as Revocation.
- 94. Revocation as to Third Parties.

PART II.—COMMISSIONS AND THEIR RECOVERY.

Chapter IX.—General Rules as to Commissions.

- § 95. General Statement.
- 96. When Commissions are Earned.
- 97. Respective Rights of Brokers when Several are Employed.
- 98. Rule as to Commissions when Several Brokers are Employed.
- 99. Liability of Principal for Commissions to Exclusive Agent.
- 100. “ for Commissions when Principal Negotiates Sale.
- 101. Rule as to Commissions when Broker's Efforts Fail.
- 102. On What Recovery of Commissions Depends.

Chapter X.—Broker Must Be Employed.

- § 103. General Statement.
- 104. Volunteers Not Entitled to Commission.
- 105. When Party Acting is a Volunteer.
- 106. Employment Necessary to Recovery of Commissions.
- 107. Manner of Employment.
- 108. Employment Must be by Owner or Authorized Agent.
- 109. Ratification Equivalent to Original Employment.
- 110. Intent to Ratify Must be Plain.
- 111. Ratification by Implication.
- 112. “ Must be with Full Knowledge of Facts.

Chapter XI.—Broker Must Be Procuring Cause of Sale.

- § 113. General Statement.
- 114. Methods of Earning Commission.
- 115. Obligations of the Broker.
- 116. Procuring Cause.
- 117. What is Required to Constitute a Broker a “Procuring Cause.”
- 118. Procuring Cause as Affected by Special Contract.
- 119. General Rule as to “Procuring Cause.”
- 120. “Procuring Cause” when Representing Purchaser.
- 121. Effect of Promises to Pay Commission.
- 122. Unsuccessful Efforts.
- 123. Failure Through Fault of Principal.
- 124. Purchaser Taking Title in Another's Name.
- 125. Effort Required of Broker.

- 126. Presence of Broker.
- 127. Introductions.
- 128. Advertising.
- 129. Consummation of Sale by Another Broker.
- 130. " " " " Principal.

Chapter XII.—Sale Must Be on Employer's Terms.

- § 131. General Statement.
- 132. Purchaser Must Agree to Seller's Terms.
- 133. All of Seller's Terms Must be Met.
- 134. Acceptance by Owner of Different Terms.
- 135. Broker's Commission, if He is "Procuring Cause," Not Affected by Variation of Terms.
- 136. Requirements as to Price.
- 137. Increase of Price by Owner.
- 138. Time of Performance.
- 139. Liability of Broker for Failure to Sell.

Chapter XIII.—Broker Must Act in Good Faith.

- § 140. General Statement.
- 141. Good Faith.
- 142. Accepting Pay from or Acting for Other Party to the Transaction.
- 143. Broker as a Principal in the Transaction or Making a Profit Therefrom Other Than His Commissions.
- 144. Broker Must Accept Largest Offer.
- 145. When Refusal to Disclose Information is Not Bad Faith.

Chapter XIV.—Availability of Purchaser.

- § 146. General Statement.
- 147. Ready and Willing to Purchase.
- 148. Purchaser Not Ready and Willing.
- 149. Procuring Person Who Takes Option.
- 150. Change of Mind by Vendor.
- 151. Disclosure of Purchaser.
- 152. Waiver of Right to Disclosure of Purchaser.
- 153. Financial Ability of Purchaser.
- 154. When Financial Ability of Purchaser Need Not be Shown.
- 155. Burden of Proof as to Financial Ability of Purchaser.

Chapter XV.—Transaction Must Be Complete.

- § 156. General Statement.
- 157. What Constitutes a Completed Transaction.
- 158. General Rule as to Completeness of Transaction.
- 159. All Details of Sale Must be Agreed Upon.
- 160. Effect of Special Conditions on Completeness of Transaction.
- 161. " " Failure to Contract.
- 162. Modification of Terms.
- 163. Options and "Alternative" Contracts.
- 164. Abandonment by Broker.

Chapter XVI.—Failure of Principal to Complete.

- § 165. General Statement.
- 166. The Broker's Obligation.
- 167. General Rule as to Failure of Principal to Complete.
- 168. Defective Title as Cause of Failure.
- 169. Special Agreements as to Title.
- 170. " Causes of Failure.

Chapter XVII.—Failure of Customer to Complete.

- § 171. General Statement.
- 172. " Rule as to Failure of Customer.
- 173. Abandonment of Broker by Customer.
- 174. Misrepresentations by Vendor.

Chapter XVIII.—Commissions on Exchanges of Property.

- § 175. General Statement.
- 176. Conflicting Decisions as to When Commissions are Earned.
- 177. Commissions on Exchanges.
- 178. Employment.
- 179. Authority to Sell Does Not Give Authority to Exchange.
- 180. Commissions from Both Sides.
- 181. Rule when Contract has been Executed.
- 182. Reason for Rule.
- 183. Rule as Affected by Broker's Bad Faith.

Chapter XIX.—Commissions on Loans.

- § 184. General Statement.
- 185. Commissions for Procuring Loan.

- 186. New York Rule.
- 187. " " " as Affected by Failure of Principal.
- 188. The Rule in Some of the Other States.
- 189. General Statement of Rule.
- 190. Further Statement of Rule.
- 191. Failure to Complete on Account of Defects, etc.
- 192. Employment and Written Authority.
- 193. Terms of Principal.
- 194. Recovery on Breach by Principal.
- 195. Amount of Commissions on Loan.

Chapter XX.—Commissions on Leases.

- § 196. General Statement.
- 197. When Broker's Obligations are Performed.
- 198. General Requirements for Recovery of Commissions.
- 199. Liability of Tenant for Commissions.
- 200. Amount of Commissions for Procuring Lease.
- 201. Effect of Failure of Lease.
- 202. Operation of Rule as to Failure of Lease.

Chapter XXI.—Who is Liable for Commissions.

- § 203. General Statement.
- 204. The Employer is Usually Liable for Broker's Commissions.
- 205. Promises to Pay Commissions.
- 206. Liability of Persons Not Owning the Property.
- 207. Trustees, Executors and Guardians.
- 208. Commissions from Purchaser.
- 209. Purchaser's Promise to Pay Commission.
- 210. Broker Employed by Purchaser.

Chapter XXII.—Amount of Compensation.

- § 211. General Statement.
- 212. Commissions. How Fixed.
- 213. Agreed Compensation.
- 214. Measure of Compensation.
- 215. All in Excess of Fixed Price.
- 216. Agreements for All in Excess of Fixed Price.
- 217. Rule as to All in Excess of Fixed Price.
- 218. " " " " " " " " " when Vendor Intervenes.
- 219. Compensation in Absence of Agreement.

- § 282. Silence and "Concealment."
- 221. " and Usage Defined.
- 222. When Custom Binds the Parties.
- 223. Ignorance of Custom.
- 224. Proof of Custom.
- 225. Rules of Real Estate Boards.
- 226. Compensation in the Absence of Agreement or Usage.

Chapter XXIII.—When Commissions Are Due.

- § 227. General Statement.
- 228. Rule as to When Commissions are Due.
- 229. Requirements of an Earned Commission.
- 230. Unsupported Agreements to Wait for Commission.
- 231. Valid Agreements Deferring Payment of Commissions.
- 232. Contingent Commission Agreements.
- 233. Construction of Agreements to Wait until Title is Closed.
- 234. Deferred Commissions and Vendor's Warranty as to Title.
- 235. Commissions on Instalment Sales.

PART III.—PRINCIPAL AND AGENT.

Chapter XXIV.—Principal's Relations to Agent.

- § 236. General Statement.
- 237. Principal May Employ Several Brokers.
- 238. Negotiations by Principal.
- 239. Exclusive Agency.
- 240. Intervention of Principal.
- 241. " " " after Broker's Failure or Termination
of Authority.
- 242. Rule when Broker's Efforts Fail.

Chapter XXV.—Agent's Relations to Principal.

- § 243. General Statement.
- 244. Agent's Responsibility to Principal.
- 245. Agent Must Act in Interest of Principal.
- 246. Agent's Duty of Faithful Service.
- 247. Agent Must Not Exceed Authority.
- 248. " " Disclose Information.
- 249. Agent's Power to Make and Endorse Negotiable Paper.
- 250. " Liability for Conversion of Money.

Chapter XXVI.—Liability of Broker and Principal.

- § 251. General Statement.
- 252. Misrepresentations by Brokers and Agents.
- 253. When Vendor is Liable for Broker's Representations.
- 254. Vendor Liable if He Accepts Proceeds.
- 255. Principal Bound by Agent's Representations.
- 256. Acceptance of Proceeds Test of Liability.
- 257. Fraud of Agent. Pleading.

Chapter XXVII.—Liability of Principal to Third Parties.

- § 258. General Statement.
- 259. Scope of Chapter.
- 260. Liability of Principal for Agent's Wrongdoing.
- 261. " " " " who Accepts Benefits of Agent's Acts.
- 262. " " " " for Agent's Contracts.
- 263. " " Undisclosed Principal.
- 264. Notice to Agent as Notice to Principal.
- 265. When Notice to Agent is Not Notice to Principal.
- 266. Agent's Knowledge Obtained in Other Transactions.
- 267. Usury of Agent.

Chapter XXVIII.—Liability of Broker to Third Parties.

- § 268. General Statement.
- 269. Scope of Chapter.
- 270. Liability of Agent for Moneys Received.
- 271. " " " " Misfeasance and Nonfeasance.
- 272. Agent Liable for Improper Contract.
- 273. Liability of the Agent on Unauthorized Contract.
- 274. Ground of Agent's Liability for Unauthorized Acts.
- 275. Warranty of Authority to Make Contract.
- 276. Reason of Liability of Agent for Unauthorized Acts.
- 277. Liability of Agent Acting for Undisclosed Principal.
- 278. Unlawful Intrusion on Real Property.

PART IV.—FRAUD.**Chapter XXIX.—What Constitutes Fraud. Acts Not Usually Considered Fraudulent.**

- § 279. General Statement.
- 280. What is Fraud?
- 281. Broker's Frauds.

- § 220. Custom as Part of the Agreement.
- 283. Requirements as to Disclosure.
- 284. Fraudulent Concealment by the Purchaser.
- 285. Promises, Hopes, etc.
- 286. " and False Representations.
- 287. Opinions; Expressions of Value.
- 288. Assertion of Value, Though False, Not Ordinarily Fraudulent.
- 289. Opinions Amounting to Affirmations of Fact.
- 290. Assertions and Opinions Fraudulent in Intent.
- 291. When Expression of Opinion is Fraudulent.

Chapter XXX.—What Constitutes Fraud. Acts Usually Considered Fraudulent.

- § 292. General Statement.
- 293. Representation that Certain Price Had Been Offered.
- 294. " as to Value and Price Paid for Property.
- 295. Representations as to Rentals.
- 296. " " Improvements.
- 297. " " Situation of Property.
- 298. " " Mortgages on Property.
- 299. Representation that Others Want the Property.
- 300. Representations as to Title of Vendor.

Chapter XXXI.—Negligence on Part of Vendee.

- § 301. General Statement.
- 302. May Vendee Rely Upon Statements of Vendor?
- 303. Vendor Not Ordinarily Required to Volunteer Information.
- 304. Vendee Required to Exercise Caution.
- 305. Degree of Caution Required by Vendee.
- 306. Vendee Must Exercise Ordinary Caution.
- 307. Negligence No Bar to Relief in Cases of Wilful Fraud.

Chapter XXXII.—Waiver. Rescission. Remedies.

- § 308. General Statement.
- 309. Waiver of the Fraud.
- 310. What Constitutes Waiver of Fraud.
- 311. Full Knowledge of Fraud Not Necessary to Waiver.
- 312. Recitals in Contract Do Not Operate as Waiver of Fraud.
- 313. Remedies for Fraud. Measure of Damage.
- 314. " " " Action to Rescind.
- 315. Liability on Contract in Case of Fraud.

- § 316. Rescission.
- 317. Offer to Restore.
- 318. Pleading Fraud.
- 319. " " Committed by More than One.
- 320. Proof of Fraud at Law and in Equity.

Chapter XXXIII.—Criminal Frauds.

- § 321. General Statement.
- 322. Obtaining Property by False Pretenses.
- 323. Compelling Execution of Instrument.
- 324. Definition and Punishment of Conspiracy.
- 325. Corrupt Influencing of Agents; Unlawful Agreements of Agent.

PART V.—PROCEDURE.

Chapter XXXIV.—Pleading.

- § 326. General Statement.
- 327. Scope of Chapter.
- 328. Complaint for Broker's Commissions.
- 329. Methods of Pleading.
- 330. Pleading Legal Effect.
- 331. " the Facts Constituting the Cause of Action.
- 332. Action Based upon a Contract.
- 333. Facts to be Stated.
- 334. Full Performance and Excuse for Performance.
- 335. Pleading Special Agreements
- 336. Matters of Defense.
- 337. Pleading Acts Done by Agent.

Chapter XXXV.—Interpleader.

- § 338. General Statement.
- 339. Double Claims for Commission.
- 340. Nature of Interpleader.
- 341. Interpleader Permissible in Broker's Commission Cases in Some States.
- 342. Interpleader Not a Universally Recognized Right.
- 343. Method of Procedure.
- 344. Interpleader When Action Brought in Court Having no Jurisdiction to Interplead.
- 345. Requisites of Interpleader.
- 346. Interpleader Makes Actions at Law Equity Suits.

PART VI.—CONTRACTS FOR SALE OF REAL ESTATE.**Chapter XXXVI.—Agreements Relating to the Sale of Real Estate.**

- § 347. Method of Presentation.
- 348. Nature of a Sale.
- 349. Usual Methods of Concluding a Sale.
- 350. Oral Agreements and Informal Written Agreements.
- 351. Options on Real Estate.
- 352. Essential Features of a Contract for Sale of Real Property.
- 353. Parties to the Contract.
- 354. Execution of Contract of Sale.

Chapter XXXVII.—Subject Matter of Contracts for Sale of Real Estate.

- § 355. Drafting Contract for Sale of Real Estate.
- 356. Description of Property in Contracts of Sale.
- 357. Statement as to Ownership in Adjacent Streets or Highways.
- 358. “ of Gross or Acreage Price.
- 359. “ “ Easements, Negative Easements, Encroachments, etc.
- 360. Leases of Property Held under Contract of Sale.
- 361. Price and Manner of Payment.
- 362. Suburban Property.
- 363. New Buildings.
- 364. Time for Delivery of Deed.
- 365. Fixtures.
- 366. Approval Clause.
- 367. General Provisions.

PART VII.—SCHEDULES AND FORMS.**Chapter XXXVIII.—Brokers' Rules. Schedules of Fees, Charges and Commissions.****Form.**

- 1. Schedule of Charges and Commissions. New York City.
- 2. “ “ Salesroom Fees and Commissions at Auctions. New York City.
- 3. Schedule of Fees, Charges and Commissions. Brooklyn, N. Y.
- 4. “ “ Salesroom Fees and Commissions at Auctions. Brooklyn, N. Y.
- 5. Rental and Management Charges. Chicago, Ill.
- 6. Charges for Ground Leases. Chicago, Ill.
- 7. Commissions on Sales. Chicago, Ill.

Form.

8. Loan Charges and Valuation Fees. Chicago, Ill.
9. Brokers' Rules, Fees, Charges and Commissions. Cook County, Ill.
10. Schedule of Fees, Charges and Commissions. Philadelphia, Pa.
11. " " " " " " St. Louis, Mo.
12. Rules and Regulations of the St. Louis Real Estate Exchange.
13. Schedule of Fees, Charges and Commissions. Boston, Mass.
14. Commission Rate Schedule. Jersey City, N. J.
15. Schedule of Brokers' Commissions. Denver, Colo.
16. Schedule of Fees, Charges and Commissions. San Francisco, Cal.

Chapter XXXIX.—Forms of Contracts for Sale of Real Estate.**Form.**

17. Contract of Sale. New York City.
18. " " " Cook County, Ill.
19. " " " Chicago, Ill.
20. " " " " "
21. " " " Philadelphia, Pa.
22. " " " Boston, Mass.
23. Agreement for Sale of Property. Baltimore, Md.
24. Contract of Sale. New Jersey. (Short Form.)
25. " " " " "
26. Agent's Sale Contract. Chicago, Ill.
27. Contract for Sale of Restricted Lots on Installment Plan.
28. " " " Lots on Installment Plan.
29. Assignment of Contract. Informal.
30. Contract for Exchange of Properties.
31. " " " " " Chicago, Ill.
32. Deed and Money.
33. Assignment of Contract.
34. " " " Without Recourse.
35. Demand for Performance of Contract of Sale.

Chapter XL.—Miscellaneous Forms.**Form.**

36. Authority to Broker to Sell.
37. Exclusive Agency Contract. Chicago, Ill.
38. Authority to Broker to Exchange Property.
39. Salesman's Contract.
40. Application for Loan. New York City.
41. " " " Chicago, Ill.
42. " " " St. Louis, Mo.
43. " " " Baltimore, Md.
44. Encroachment Agreement.
45. " " "

Chapter XLI.—Forms for Pleading.

Form.

46. Complaint for Recovery of Broker's Commissions. Short. (First Form.)
47. Complaint for Recovery of Broker's Commissions. Short. (Second Form.)
48. Complaint for Recovery of Broker's Compensation. (Two Counts.)
49. Motion for Interpleader in New York City Municipal Court.
50. " " Interpleader. Supporting Affidavit.
51. Order of Interpleader.
52. Complaint after Interpleader.

THE LAW OF REAL ESTATE BROKERS.

PART I.—POWERS, AUTHORITY AND RIGHTS OF BROKER.

CHAPTER I. INTRODUCTORY.

§ 1. Definition of Real Estate Broker.

“ Real estate brokers are those who negotiate between the buyer and seller of real property, either finding a purchaser for one desirous to sell, or vice versa; they also manage estates, lease or let property, collect rents, and negotiate loans on bonds and mortgages.”¹

§ 2. Application of Term.

While in one case² it was said that the class of persons who are employed by owners of lands to find a purchaser for them, or, by those desirous of purchasing, to procure a vendor for them, are not in any legal or proper sense brokers, it has been stated, more recently, that the term *broker* is properly applied to a middleman.³ But whatever technical objection there may be to the use of

¹ 4 Am. & Eng. Ency. of Law (2nd Ed.), 962.

² Rowe v. Stevens, 35 N. Y. Super. Ct. (3 J. & S.) 189 (1873); aff'd, 53 N. Y. 621 (1873).

³ Southack v. Lane, 23 Misc. 515 (N. Y. 1898).

the word "broker" in such case, it remains the actual fact that the term "real estate broker" is now used by jurist, lawyer and layman alike, to denote the agent who acts either for the purchaser or seller, or both, in negotiating the sale of real estate, or in any of the capacities embraced within the above definition.

§ 3. Functions of a Broker.

"A broker is an agent primarily to establish privity of contract between two parties."⁴ "A broker is, in general, one who buys or sells property for another. Real estate brokers are agents for the sale and purchase of real property."⁵ As stated in one of the leading cases on the subject of brokers,⁶ quoting from Story: "'The true definition of a broker seems to be that he is an agent employed to make bargains and contracts between other persons in matters of trade, commerce or navigation for a compensation commonly called brokerage.' Story Agency, § 28, p. 25. In *Pott v. Turner*, 6 Bing. 702, 706, a broker is more tersely and quite accurately described as 'one who makes a bargain for another and receives a commission for so doing.'"⁷

And so it is said that the ordinary principles governing the relation of principal and agent apply to real estate brokers.⁸ In one case⁹ it was said, however, that "a broker is regarded as a middleman, and not as an agent in whom peculiar trust and confidence are placed."¹⁰

⁴ Clark on Contracts, 736.

⁵ Law of Contracts, Special Topics, West Pub. Co. (1896), Topic "Brokers," p. 2.

⁶ *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378 (1880).

⁷ See also *Little Rock v. Barton*, 33 Ark. 444-449 (1878); *Kramer v. Blair*, 88 Va. 463 (1891); *McCullough v. Hitchcock*, 71 Conn. 404 (1899).

As to whether a person making an isolated sale is a broker, see *O'Neill v. Sinclair*, 153 Ill. 525 (1894).

⁸ *Martin v. Bliss*, 57 Hun 157 (N. Y. 1890); *Low v. Woodbury*, 107 App. Div. 298 (N. Y. 1905); *Kingsley v. Wheeler*, 95 Minn. 362 (1905). See also *Wilkinson v. McCullough*, 196 Pa. St. 208-209 (1900).

⁹ *Vinton v. Baldwin*, 88 Ind. 105 (1882).

¹⁰ Citing *Alexander v. Northwestern Un.*, 57 Ind. 466; *Rowe v. Stevens*, 53 N. Y. 261; *Rupp v. Sampson*, 16 Gray 398; *Redfield v. Tegg*, 38 N. Y. 212; *Barry v. Schmidt*, 27 Alb. L. J. 297.

§ 4. Definition of Terms.

The “ principal ” is one for whom the agent acts, and the term “ principal ” is hereinafter used interchangeably with “owner,” “seller,” and “vendor.” The word “ vendor ” signifies the seller, while “ vendee ” signifies the purchaser.

CHAPTER II.

WHO MAY ACT AS BROKER. LICENSE REQUIREMENTS.

§ 5. General Statement.

Any person may act as a broker, including minors and married women. (§§ 6-8.) Partnerships and business corporations may likewise act as brokers. (§§ 9, 10.) In some localities a license is required for, or a tax is imposed on, the right to do business as a real estate broker. (§ 11.)

§ 6. Married Women as Brokers.

In general, any person may act as a real estate broker. In New York, a married woman may act as such broker, for the law in New York State gives a married woman all the rights in respect to property, real or personal, and the acquisition, use, enjoyment and disposition thereof, and the same power to make contracts in respect thereto with any person, including her husband, and to carry on any business, trade or occupation, and to exercise all powers and enjoy all rights in respect thereto and in respect to her contracts, and be liable on such contracts, as if she were unmarried.¹ Nor does her contract bind her husband or his property.² The same is almost universally true throughout the United States. (See next section.)

¹ N. Y. Cons. Laws, Ch. 14, § 51, formerly § 21 Dom. Rel. Law.

² N. Y. Cons. Laws, Ch. 14, § 55, formerly § 25 Dom. Rel. Law.

§ 7. Married Women as Brokers. State Laws.

In the following states and territories a married woman may contract on her own account, or carry on business on her own account: Alabama; Alaska; Arizona; California; Colorado; Connecticut;³ Delaware (as to contracts "necessary to be made with respect to her own property");⁴ District of Columbia;⁵ Florida (but only after application to the court); Georgia; Hawaii (except she cannot make contract for personal service without written consent of husband);⁶ Idaho; Illinois (but she cannot carry on a partnership business without the consent of her husband, unless he has abandoned her or is insane or confined in the penitentiary);⁷ Indiana;⁸ Iowa; Kansas;⁹ Kentucky; Maine; Maryland; Massachusetts (certificate should be filed); Michigan; Minnesota;¹⁰ Mississippi; Missouri; Montana (on application to court); Nebraska; Nevada (after order by court); New Hampshire; New Jersey;¹¹ North Carolina (by certificate filed);¹² North Dakota; Ohio;¹³ Oklahoma; Oregon; Pennsylvania (with exceptions); Rhode Island; South Carolina;¹⁴ South Dakota; Utah; Vermont; Virginia; Washington;¹⁵ West Virginia (to some extent); Wisconsin (to a limited extent);¹⁶ and Wyoming. But in some states the right of a married woman to contract on her own account or to carry on business on her own account is limited even more than hereinbefore stated, or is withheld altogether, as in Louisiana (not without authority of husband, except when she is a public merchant), Tennessee and Texas.

³ General Statutes (1902), § 593.

⁴ 14 Delaware Laws, Ch. 550.

⁵ Code of the District of Columbia, § 1155.

⁶ Revised Laws of Hawaii, § 2252.

⁷ Hurd's Revised Statutes, § 1242.

⁸ Act of 1881.

⁹ General Statutes (1905), par. 4214.

¹⁰ Revised Laws (1905), §§ 3605-3608.

¹¹ General Statutes, p. 2014.

¹² Revised Laws (1905), § 2112.

¹³ Revised Statutes, §§ 3110-3114.

¹⁴ Code of Laws (1902), Vol. 1, § 2666.

¹⁵ 1 Ball. C. & S., §§ 4493, 4504.

¹⁶ See Statutes, § 2344.

§ 8. Minors.

And so any person under legal age may act as a broker. At least, a minor acting as broker could recover any earned commission, for it is the minor only, or on his death his representatives, who can take advantage of his infancy.¹⁷ The person employing such minor broker may, however, have some difficulty where any obligations arise on the broker's part which are contract obligations, for such the minor could avoid.¹⁸ But for any tortious acts, such as fraud, conversion, and the like, the minor would be liable the same as an adult.¹⁹

§ 9. Partnerships.

A partnership may act as agent. An authority by a principal to two persons not partners to do an act is joint, and the act must be concurred in by both. When a firm is appointed to an agency, this rule would necessarily be modified to the extent that either member of the firm could do any act within the scope of the agency just as he could perform any other partnership act. By appointing a partnership it would be implied that the authority was joint and several. But upon dissolution of the firm such an agency would cease.²⁰

§ 10. Corporations.

A business corporation may, in general, act as a real estate agent, if it is within the scope of its powers.

§ 11. License or Tax on Right to Act as Broker.

In some localities a license is required for, or a tax is imposed on, the right to do business as a real estate

¹⁷ Clark on Contracts, 242.

¹⁸ 2 Abb. Cyc. Dig. (N. Y.), 839; 15 Id., 1557; 27 Am. Dig. (Cent. Ed.), p. 1138; 16 Am. & Eng. Ency. of Law (2nd Ed.), p. 285.

¹⁹ 2 Abb. Cyc. Dig. (N. Y.), 846; 15 Id., 1558. See *Stone v. Rabinowitz*, 45 Misc. 405 (N. Y., 1904), as to conversion.

²⁰ *Martine v. Int. Life Ins.*, 53 N. Y. 339 (1873); *McLaughlin v. Wheeler*, 1 S. D. 514 (1891).

broker.²¹ It would be impossible to give any authoritative discussion of this subject, since in some instances the license or tax is imposed by municipal ordinance and in some by general statutes. All of these are subject to such frequent change or other vicissitude, that a presentation of them would be of little value for permanent use and the labor of gathering even an incomplete list would be quite an impossible task. We therefore reluctantly content ourselves with resorting to the well-worn suggestion that the local ordinances or statutes should in each case be consulted.²² In Texas it is held that the failure to pay the occupation tax and to obtain a license does not preclude a recovery of commissions.²³

²¹ A real estate agent who does not engage in the "purchase or sale of securities" is not required by the United States Revenue Laws to pay a tax. *Rounds v. Alee*, 116 Iowa 348 (1902).

²² The following authorities which bear on the subject may be of some value: *Commonwealth v. Black Co.*, 34 Pa. Super. Ct. 431 (1907); *Wiltse v. State*, 55 Tenn. 544 (1873); *Prince v. Eighth St. Church*, 20 Mo. App. 332 (1886); *Braun v. City of Chicago*, 110 Ill. 186 (1884); *Little Rock v. Barton*, 33 Ark. 436 (1878); *Ober v. Stephens*, 54 W. V. 354 (1903); *O'Neil v. Sinclair*, 153 Ill. 525 (1894); *Marker v. Tough*, 98 Pac. 792 (Kans. 1908); *Denning v. Yount*, 50 L. R. A. 103 (Kans. 1900). See also §§ 14-22 *infra*.

²³ *Watkins Co. v. Thetford*, 96 S. W. 72 (Tex. 1906).

CHAPTER III.

WRITTEN AND ORAL AUTHORITY OF BROKER.

§ 12. General Statement.

Generally, the broker's authority to negotiate the sale or purchase of real estate, loans thereon, or the renting thereof, need not be in writing (§§ 13-26), except that,—

(1) The statutes in some jurisdictions require written authority. (§§ 14-22.)

(2) An authority to a broker which, by its terms, is not to be performed within a year, must be in writing. (§§ 24-26.)

§ 13. Form of Authorization.

As a general rule, the broker's authority to negotiate a sale, a purchase or exchange of real estate, mortgage loan or lease, need not be in writing.¹ The requirement of the Statute of Frauds in some states that a contract for the sale of real estate must be in writing, subscribed by the vendor or his agent thereunto authorized *in writing*,² must not be confused with the proposition as to whether the agent's authority to negotiate a sale should be in writing. As was said in one case, "a person may employ a broker or agent to negotiate a sale of real estate without giving him written authority so to do. As between the vendor and vendee, the authority of the

¹ Fisher Co. v. Woods, 187 N. Y. 90 (1907); Waterman R. E. Exchange v. Stephens, 71 Mich. 104 (1888); Griffith v. Woolworth, 28 Neb. 717 (1890); (See also § 20 as to present Nebraska statute); Jackson v. Higgins, 70 N. H. 637 (1900); Lamb v. Baxter, 130 N. C. 67 (1902); McLaughlin v. Wheeler, 1 S. D. 497 (1891). See also §§ 24-26 *infra* as to agreements not to be performed within a year.

² See §§ 31-37 *infra*.

agent of the vendor to sign the contract of sale must be in writing,³ but the rule goes no further.”⁴ But in some jurisdictions the statutes require written authority in the broker, either to negotiate the sale or exchange of real property, or to procure a loan upon it. There may, of course, also be local regulations where there are no state statutes, but with the extent or validity of such local regulations this chapter cannot assume to deal. The following sections contain the statute of each of several representative states.

§ 14. New York; Authority to Negotiate Sale.

Chapter 128 of the New York Laws of 1901, which went into effect September 1, 1901, and became § 640d of the then Penal Code, provided that, “In cities of the first and second class,⁵ any person who shall offer for sale any real property without the written authority of the owner of such property, or of his attorney in fact, appointed in writing, or of a person who has made a written contract for the purchase of such property with the owner thereof, shall be guilty of a misdemeanor.”

The lower and intermediate appellate courts of New York were divided as to the legality of this statute. Some held that the broker could not recover commissions unless his authority to sell was in writing,⁶ while others held that the broker could recover notwithstanding his authority was not in writing.⁷ Then, too, distinctions were drawn, and it was held that the statute did not apply where a broker was employed to sell the interest of an intending purchaser under a con-

³ This is a requirement of the Illinois statute of frauds which provides that an agent's authority to sign a contract must be in writing. See statute quoted in § 36 *infra*.

⁴ *Monroe v. Snow*, 131 Ill. 135 (1891).

⁵ The New York State Constitution defines such cities—Art. XII, § 2.

⁶ *Whiteley v. Terry*, 39 Misc. 93 (N. Y. 1902); 83 App. Div. 197 (N. Y. 1903); *Cohen v. Bocuzzi*, 42 Misc. 544 (N. Y. 1904).

⁷ *Grossman v. Caminez*, 79 App. Div. 15 (N. Y. 1903); *Cody v. Dempsey*, 86 App. Div. 335 (N. Y. 1903).

tract for the sale of real estate.⁸ Finally, however, the Court of Appeals of New York, which is the court of last resort in that State, declared the law unconstitutional,⁹ the law itself was repealed by Chapter 516, Laws of 1906, May 21, 1906, and, apparently, that there might be no question about it, the law was again repealed by the new Penal Law of 1909.¹⁰ Written authority to negotiate a sale is therefore no longer necessary in New York State.

§ 15. New York; Authority to Negotiate Loan.

With respect to a broker's authority to negotiate a loan in New York, a statute similar to that mentioned in the preceding section was also found in Chapter 128 of the New York Laws of 1901, in effect September 1, 1901, and this statute became § 640e of the then Penal Code. It provided as follows: "In cities of the first and second class,¹¹ any person who shall make application to any other person, or to any corporation, for a loan upon any real property, without the written authority of the owner of such real property, or of his attorney in fact, appointed in writing, or of a person who has made a written contract for the purchase of such property with the owner thereof, shall be guilty of a misdemeanor."

While Chapter 516 of the Laws of 1906 assumed to repeal the whole of Chapter 128 of the Laws of 1901, it referred specifically only to § 640d of the Penal Code, but whatever there might be of doubt as to whether § 640e of the Penal Code was thereby repealed is set at rest by the new Penal Law,¹² which repealed Chapter 128 of the Laws of 1901 in its entirety. Then, however, by § 2039 of the Penal Law aforesaid, the provision was re-enacted in exactly the same words as former

⁸ *Levy v. Timble*, 47 Misc. 394 (N. Y. 1905).

⁹ *Fisher Co. v. Woods*, 187 N. Y. 90 (1907).

¹⁰ N. Y. Laws of 1909, Ch. 88; Cons. Laws, Ch. 40.

¹¹ The State Constitution defines such cities in Art. XII, § 2.

¹² N. Y. Laws of 1909, Ch. 88; Cons. Laws, Ch. 40.

§ 640e of the Penal Code, above given. But does not this section of the Penal Law offend the Constitution as did § 640d of the former Penal Code?¹³

§ 16. New Jersey; Authority to Sell or Exchange.

In New Jersey the statute provides, "That no broker or real estate agent, selling or exchanging land for or on account of the owner, shall be entitled to any commission for the sale or exchange of any real estate, unless the authority for selling or exchanging such land is in writing, and signed by the owner or his authorized agent, and the rate of commission on the dollar shall have been stated in such authority."¹⁴ It applies to one who makes only an occasional sale as well as to brokers.¹⁵

§ 17. California; Authority to Purchase or Sell.

In California the statute reads: "The following contracts are invalid, unless the same or some note or memorandum thereof be in writing and subscribed by the party to be charged, or by his agent: * * * 6. An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission."¹⁶

§ 18. Missouri; Authority to Sell.

In Missouri the statute provides: "In cities of 300,000 inhabitants or more, any person who shall offer for sale any real property without the written authority of the owner of such property, or of his attorney-in-fact, appointed in writing, or of a person who has made a writ-

¹³ See *Fisher Co. v. Woods*, 187 N. Y. 90 (1907).

¹⁴ General Statutes, N. J. (Ed. 1709-1895), Title "Frauds & Perjuries," § 10, p. 1604. See *Leimbach v. Regner*, 70 N. J. L. 608 (1904).

¹⁵ *Stout v. Hunphrey*, 69 N. J. L. 436 (1903).

¹⁶ Cal. Civil Code, § 1624. See *McGeary v. Satchwell*, 129 Cal. 389 (1900), where authorities are cited.

ten contract for the purchase of such property, with the owner thereof, shall be deemed guilty of a misdemeanor and fined in a sum of not less than \$10 nor more than \$300.”¹⁷

§ 19. Missouri; Authority to Negotiate Loan.

With respect to negotiating a loan, the Missouri statute provides: “In cities of 300,000 inhabitants or more, any person who shall make application to any other person, or to any corporation, for a loan upon any real property without the written authority of the owner of such real property, or of his attorney-in-fact, appointed in writing, or of any person who has made a written contract for the purchase of such property with the owner thereof, shall be deemed guilty of a misdemeanor and fined in a sum not less than \$10 nor more than \$300.”¹⁸

§ 20. Nebraska; Authority to Sell.

In Nebraska the statute reads: “Every contract for the sale of lands, between the owner thereof and any broker or agent employed to sell the same, shall be void, unless the contract is in writing and subscribed by the owner of the land and the broker or agent, and such contract shall describe the land to be sold, and set forth the compensation to be allowed by the owner in case of sale by the broker or agent.”¹⁹ In *Covey v. Henry*, 71 Neb. 118 (1904), at pages 123, 124, the court comments as follows: “The section of the statute above set out is plain and unambiguous. The reasons which impelled the legislature to pass that act are well known to the courts and the profession generally. Innumerable suits were being

¹⁷ Mo. Laws of 1903 (H. B. 509), p. 161, § 1. See *Real Estate & Trust Co. v. Hartman*, 128 Mo. App. 233 (1907). See the New York statute, similar to this (§ 14 *supra*), which was declared unconstitutional.

¹⁸ Mo. Laws of 1903 (H. B. 509), p. 161, § 2. See comments on a similar statute of New York, § 15 *supra*.

¹⁹ Compiled Statutes, Ch. 73, § 74 (Annotated Statutes, 10258).

instituted, from time to time, by agents and brokers, after the owner of lands had sold the same, claiming a commission on the ground that they had been instrumental in securing the purchaser; and, in many cases, owners of land were compelled to pay double commission on account of such claims."

§ 21. Washington; Authority to Sell or Purchase.

In the State of Washington, the statutory provision is as follows: "An agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission" is void unless the "agreement, contract or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized."²⁰

§ 22. Montana; Authority to Purchase or Sell.

"An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation, or a commission," is invalid, unless the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged, or his agent.²¹

§ 23. Authority to Collect Rents.

A broker's authority to collect rents need not be in writing, unless the authority comes within the prohibition of the statutes requiring agreements not to be performed within a year to be in writing.²²

§ 24. Statute of Frauds as Affecting Brokers.

Reference has already been made to the "Statute of Frauds." To present the subject comprehensively and

²⁰ Washington Laws of 1905, Ch. 58, p. 110.

²¹ Montana Civil Code, § 2185.

²² For a discussion of this class of agreements, see §§ 24-26 *infra*.

yet briefly, we quote from Clark on Contracts, page 90, this extract: "The famous statute of frauds and perjuries, 29 Car. II, c. 3, was enacted in England in 1677, during the reign of Charles the Second, and, as stated in its recital, had for its object the 'prevention of many fraudulent practices, which are commonly endeavored to be upheld by perjury and subornation of perjury.'

* * * The original statute, which is substantially followed by the statutes of most of our states, contains two sections—the fourth and the seventeenth—which affect the form of certain simple contracts. The fourth section provides: 'That no action shall be brought whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or mis-carriage of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract, or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.' "

The seventeenth section of the English statute is not involved in the present discussion, which is confined to the requirement of the statute in its bearing upon brokers, that all agreements not to be performed within a year from the making thereof shall be in writing.

As Mr. Clark says, the English statute has been substantially followed in most of our states, although in some the statute is materially different. It would be quite beyond the scope of the present work to attempt

to present the language of the so-called Statute of Frauds of each state. We shall therefore merely use the New York statute as a basis for a brief discussion of the subject, adding such miscellaneous authorities as will at least indicate the general inclination of the courts with respect thereto.

§ 25. **Agreements Not to be Performed within a Year.**

Three situations present themselves which may be discussed in view of the statute which requires all agreements not to be performed within a year to be in writing. First, where a person places real property in the hands of a broker to collect the rents and manage the property and fixes no time as to the continuance of the authority. Second, where property is placed in the hands of a broker for such purposes and the authority is to continue for more than a year. Third, where property is placed in the hands of a broker for such purposes and the authority is to continue for more than a year, or until the person shall sell the property, or which may be terminated upon some other contingency.

§ 26. **Classification of Agreements Not to be Performed Within a Year.**

(a) **WHERE NO TIME IS FIXED.**

Where no time is fixed, either party may terminate the relation at any time, and as the law is that "if the agreement may, consistently with its terms, be entirely performed within the year, although it may not be probable or expected that it will be performed within that time, it is not within the condemnation of the statute," there need therefore be no writing.²³

²³ *Everitt v. N. Y. Eng. Co.*, 14 Misc. 580 (N. Y. 1895); 20 Misc. 548 (N. Y. 1897); *Jagau v. Goetz*, 11 Misc. 380 (N. Y. 1895). See also *Warren v. Holbrook*, 118 N. Y. 593 (1889).

(b) AGREEMENTS FOR MORE THAN A YEAR.

The statute provides that every agreement, promise or undertaking is void, unless in writing, if by its terms it is not to be performed within one year from the making thereof.²⁴ Under the New York statute, the agreement, or note or memorandum thereof, must be subscribed "by the party to be charged therewith, or by his lawful agent."²⁵

(c) AGREEMENTS FOR MORE THAN A YEAR, BUT TERMINABLE UPON SOME CONTINGENCY.

Where the agreement is to continue for more than a year from the time it is made, but it is also agreed that either party may terminate it within the year, or where the agreement is to continue for more than a year or until the happening of an event which may transpire before the end of the year, it need not be in writing.²⁶

In *Eiseman v. Schneider*, 60 N. J. L. 292, 293 (1897), it was said: "As early as the case of *Peter v. Compton*, Skin. 353, the great majority of the judges declared that 'where the agreement was to be performed upon a contingent, and it does not appear within the agreement that it is to be performed after the year, there a note in writing is not necessary, for the contingent might happen within a year; but where it appears by the whole tenor of the agreement that it is to be performed after a year, there a note is necessary; otherwise, not.'

"This has been the generally accepted rule since that case was decided.

"Parol agreements to do something for an indefinite period which may be terminated within a year are valid.

"To be within the statute, it must be such an agreement as does not admit of performance, according to its

²⁴ N. Y. Cons. Laws, Ch. 41, § 31 (L. 1909, Ch. 45), formerly § 21 Personal Prop. Law.

²⁵ N. Y. Cons. Laws, Ch. 41, § 31.

²⁶ *Blake v. Volgt*, 134 N. Y. 69 (1892).

language and intention, within a year from the time it is made.

“ The following contracts by parol have been held to be enforceable and not within the statute of frauds:

“ To pay upon the death of a third person.

“ To pay upon the termination of a suit.

“ To pay on the day of the promisor's marriage, which was the case in *Skinner*.

“ To marry upon restoration to health.

“ To pay out of one's estate after death.

“ To pay during life of promisee. To pay during coverture.”²⁷

²⁷ *Citling King's Executors v. Hanna*, 9 B. Mon. 369; *Sword v. Kelth*, 31 Mich. 247; *McConahey v. Griffey*, 82 Iowa 564; *Hutchinson v. Hutchinson*, 46 Me. 154; *Blanchard v. Weeks*, 34 Vt. 589; *Burney Adm. v. Ball*, 24 Ga. 505; *Houghton v. Houghton*, 14 Ind. 505; *Blake v. Voigt*, 134 N. Y. 69; *Bull v. McCrea*, 8 B. Mon. 422; *Browne on Frauds* (5th Ed.), §§ 272, 276, and cases cited; *Peter v. Compton*, 1 Smith Lead. Cas. 143; *Howard's Adm. v. Burgen*, 4 Dana (Ky.) 137.

CHAPTER IV.

BROKER'S POWER TO SIGN CONTRACT.

§ 27. General Statement.

The mere employment of a broker as such only authorizes him to act as an intermediary to bring the parties together, and gives him no authority to sign a contract. But authority to sign a contract may be given him. (§§ 28-41.)

In some jurisdictions an agent's authority to execute a contract for the sale of lands may be oral; while in other jurisdictions the authority must be in writing. (§§ 31-41.)

A subsequent ratification is equally effectual as an original authority. (§ 42.)

Authority to make a contract does not include authority to cancel or surrender it. (§ 45.)

§ 28. Broker's Authority to Sign Contract.

In order to determine when a real estate agent has authority to sign a contract and when he has not such authority, we must necessarily look to the circumstances attending the placing of the property with him, unless the authority is alleged to have been given prior or subsequent to that time. Mere brokers or middlemen, acting for both parties, and whose duty is ordinarily limited to bringing together the parties upon an agreement, are without power to execute a contract of sale, but an agent *authorized to sell* real estate may enter into a contract within the terms of his authority, which will bind his

principal, and this, it has been held, is of the very essence of the authority given, *viz.*, an authority to sell.¹ One who deals with an agent, knowing him to be such, is bound to know the limitations placed upon his authority.²

§ 29. Powers Conferred by Instructions to Sell Property.

Ordinarily when a person places property with a real estate agent he instructs him to "sell the property." He really means that the agent is to find a purchaser.³ Yet no such fine distinction of words is ever indulged in at such times, and from our own experience, we are satisfied that any ordinary landowner may, without difficulty, be made to say that he gave the broker authority "to sell" the property. We have found, however, that juries will usually give the same meaning to the words as the landowner did, and conclude that the broker was authorized merely to find a purchaser.⁴

We could easily dismiss the subject by stating generally that it must resolve itself into a question of intention, but a more definite and satisfactory answer may naturally be expected. The situation is sometimes a serious one for the landowner, since he may at any time find a jury or a court informing him against his own belief and intention that he gave an agent authority to sign a contract for him, and it may be equally embarrassing for the broker, since he may sign a contract for the owner in good faith and then be shocked into no pleasant mood by a verdict that he had no such authority. Such a situation may subject a responsible broker to considerable loss, as we shall see later.⁵

¹ Haydock v. Stow, 40 N. Y. 368 (1869). See the more extended discussion and citation of authorities in sections following.

² Commonwealth Trust Co. v. Young, 122 App. Div. 502 (N. Y. 1907); Dayton v. Buford, 18 Minn. 126, 132 (1871); Kramer v. Blair, 88 Va. 462 (1891); Milne v. Kleb, 44 N. J. Eq. 381 (1888).

³ See Bacon v. Davis, 98 Pac. Rep. 71 (Cal. 1908). On the words, "I will sell," see Bosseau v. O'Brien, 4 Biss. 395 (U. S. 1869).

⁴ See §§ 30-41 *infra*.

⁵ §§ 38-41, 272-276 *infra*.

§ 30. Powers Conferred by Appointment as Agent.

It may be argued that the agent has power to sign a contract because "the appointment of an agent, in general, carries with it all powers necessary, proper and usual, to effectuate the purposes of the appointment."⁶ But this must be taken in connection with the further statement that "the agent may use the *ordinary and appropriate means* in execution of the power given to him; and they are deemed to be comprehended within the authority, although not expressed."⁷ But, under the prevailing rule, a real estate broker fulfills his duty when he presents to the principal a purchaser ready, willing and able to purchase on the terms prescribed by the principal,⁸ or, under the rule which prevails in some jurisdictions, when he procures an enforceable contract of sale;⁹ but under neither rule does it follow impliedly from the broker's authority "to sell" that he has power to sign a contract of sale for his principal without special authority to do so.

§ 31. Broker's Power to Contract as Affected by Statutory Requirements.

The Statute of Frauds of each state is of importance in determining whether the broker has authority to sign the contract of sale.

In those states in which the Statute of Frauds requires the contract of sale to be signed by the vendor or his duly authorized agent, *thereunto authorized in writing*, or where similar words are used, it would, of course, require written authority for the broker to sign the contract, and from the viewpoint of evidence, the question could be determined by his ability or inability to produce written authorization.

⁶ Hall v. Lauderdale, 46 N. Y. 70 (1871).

⁷ *Id.*

⁸ §§ 96, 115, 117-119 *infra*.

⁹ §§ 115, 117-119 *infra*.

In those states in which the Statute of Frauds requires the contract of sale to be signed by the vendor or his duly authorized agent, and the provision that the agent's authorization to sign must be in writing is omitted, questions difficult to determine frequently arise.

It is beyond the scope of this work to present the statutes of each state. The statutes of several states are, however, presented in the following sections, while the decisions in some of the other states are also referred to, although the statutes are not given.

The statutes requiring the agent's authority to negotiate a sale to be in writing¹⁰ must not be confused with the statutes requiring written authority in the agent to sign the contract. In the former case, although the agent has written authority to sell as required by statute, the question nevertheless arises whether this written authority to sell includes authority to sign the contract.

§ 32. New York Rule.

In New York, while generally the contract of sale must be in writing, the authority of an agent to sign the contract for his principal need not be in writing. With respect to a contract, the statute¹¹ provides that it must be "subscribed by the grantor or by his lawfully authorized agent," while with respect to a deed it provides¹² that it shall be subscribed by the grantor, "or by his lawful agent, thereunto authorized *by writing*." In other words, while as to deeds the agent's authority to sign for the principal must be in writing—*i. e.*, by power of attorney or otherwise—as to contracts for the sale of real property the agent may be *orally* authorized

¹⁰ §§ 13-22 *supra*.

¹¹ N. Y. Cons. Laws, Ch. 50, § 259, formerly § 224 of the Real Prop. Law.

¹² N. Y. Cons. Laws, Ch. 50, § 242, formerly § 207 of the Real Prop. Law.

to sign for the principal.¹³ In an early case,¹⁴ the court, after observing that the statute does not require a seal to a contract for the sale of real estate, says: "The authority of the agent (to sign the contract) may be conferred by parol; neither a written authority nor an authority under seal is required."¹⁵

It has been observed that here exists a peculiar situation with respect to a contract for the sale of real estate. The statute requires that when a person himself makes the contract for the sale of real estate it must be in writing, signed by him. When he makes the contract through an agent, the agent may sign, but the agent's authority may be given orally. What, therefore, it is said, the person himself cannot do, except in writing, he may do orally through another. But it seems that the situation is not very peculiar after all, for is not the agent acting for the principal? And when the agent signs the contract, is it not the act of the principal, performed through his agent? This being true, the peculiarity of the situation does not deserve as much attention as do the dangers, sometimes to the principal, sometimes to the agent, which attend the situation.

§ 33. New Jersey Rule.

In New Jersey, the statute provides, "that no action shall be brought * * * upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them * * * unless the agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized."¹⁶

¹³ *Appelbaum v. Galewski*, 34 Misc. 281 (N. Y. 1901); *Worrall v. Munn*, 5 N. Y. 243 (1851).

¹⁴ *Worrall v. Munn*, 5 N. Y. 243 (1851).

¹⁵ See also *Newton v. Bronson*, 13 N. Y. 593 (1856). See also § 46 *infra*.

¹⁶ General Statutes of N. J. (1709-1895), Vol. 2, p. 1603, § 5.

An agent may be orally authorized to enter into a written contract for the sale of land.¹⁷ In New Jersey, therefore, the agent's authority to sign the contract need not be in writing.

§ 34. Massachusetts Rule.

Nor does the Massachusetts statute require the agent's authority to sign the contract to be in writing. The statute provides: "No action shall be brought * * * upon a contract for the sale of lands, tenements or hereditaments or of any interest in or concerning them * * * unless the promise, contract or agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or by some person thereunto by him lawfully authorized."¹⁸

§ 35. California Rule.

In California the agent's authority to sign the contract must be in writing. "The following contracts are invalid, unless the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged, or by his agent: * * * 5. An agreement for the leasing for a longer period than one year, or for the sale of real property, or for an interest therein, and such agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent be in writing, subscribed by the party sought to be charged."¹⁹

§ 36. Illinois Rule.

And in Illinois the agent's authority to sign a contract must be in writing. The statutory provision is:

¹⁷ *Milne v. Kleb*, 44 N. J. Eq. 378 (1888); *Brown v. Honiss*, 74 N. J. L. 505 (1906).

¹⁸ Revised Laws of Mass. (1902), Ch. 74, § 1.

¹⁹ Cal. Civil Code, § 1624.

"No action shall be brought to charge any person upon any contract for the sale of lands, tenements or hereditaments, or any interest in or concerning them, for a longer term than one year, unless such contract or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized in writing, signed by such party * * * ." ²⁰

§ 37. Rule in Other States.

Minnesota requires written authority of the agent to sign contract.²¹ And so does North Dakota.²² But, as has been said, the statute of each state cannot be reproduced here. It is advisable, therefore, to consult the laws of the particular state as occasion arises.

§ 38. When Broker has Authority to Sign Contract.

The ordinary authority of a real estate broker deputed to sell real estate is simply to find a purchaser, and he has no power to bind his principal by a contract of sale, unless it was intended to confer such additional authority.²³ "Authority to make or sign a written contract is not conferred, where the thing to be sold is land, by giving an agent power, by parol, to sell."²⁴

§ 39. Mere Employment Does Not Give Power to Contract.

"The mere employment of an ordinary real estate

²⁰ Starr & Curtis's Ann. Ill. Stats., Vol. 2 (1896), p. 1997, Ch. 59, § 2. See *Hughes v. Carne*, 135 Ill. 519 (1891).

²¹ Revised Laws (1905), § 3488.

²² Revised Code, § 3960.

²³ *Bacon v. Davis*, 98 Pac. Rep. 71 (Cal. 1908), (citing *Brandrup v. Britten*, 11 N. D. 376). To the same effect are *Manker v. Tough*, 98 Pac. Rep. 792 (Kans. 1908); *Hardinger v. Columbia*, 97 Pac. Rep. 445 (Wash. 1908); *Dotson v. Milliken*, 27 App. D. C. 514, 518 (1906); *Furst v. Tweed*, 93 Iowa 302 (1895); *Ettinger v. Weatherhead*, 29 Ohio Cir. Ct. 137 (1906); *Schmidt v. Zahrdt*, 148 Ind. 447 (1897), (citing *Grant v. Ede*, 85 Cal. 418; *Duffy v. Hobson*, 40 Cal. 240; *Armstrong v. Lowe*, 76 Cal. 616; *Condon v. Osgood*, 65 N. W. 1603 (Ia.); *Jenkins v. Locke*, 3 App. D. C. 485; *Ballou v. Bergvendsen*, 9 N. D. 285 (1900); *Foss Inv. Co. v. Ater*, 95 Pac. 1019 (Wash. 1908).

²⁴ *Milne v. Kleb*, 44 N. J. Eq. 382 (1888). See also § 33 *supra*.

broker to effect a sale of a parcel of land, even though the price and terms be prescribed, does not amount to giving present authority to such broker to conclude a binding contract for the same. Moreover, such authority is not usually to be inferred from the use by the principal and broker in that connection of the terms 'for sale' or 'to sell' and the like. Those words, in that connection, usually mean no more than to negotiate a sale by finding a purchaser upon satisfactory terms."²⁵ In *Kramer v. Blair*, 88 Va. 463, 464 (1891), the court refers to *Grant v. Ede*, 85 Cal. 418, to show that the words "we will sell" do not mean that the broker was authorized to sell, and quotes from the California case: "A general authority to sell real estate includes merely the power to find a purchaser therefor, and the agent cannot conclude a contract which will be binding upon his principal." (See §§ 28-30.)

§ 40. **Extent of Authority Ordinarily Conferred by Employment.**

"Ordinarily, when property is placed in the hands of an agent to sell, the authority conferred is only held to be the authority to find a purchaser at a given price and submit the same to the owner, and not an authority to sell and bind the owner."²⁶ "A real estate broker or agent is one who negotiates the sale of real property. His business, generally speaking, is only to find a purchaser who is willing to buy the land upon the terms fixed by the owner. He has no authority to bind the principal by signing a contract of sale."²⁷ "The business of agents for the purchase or sale of real estate is simply to bring the parties together. What is done by

²⁵ *Kelm v. Lindley*, 30 Atl. Rep. (N. J. Ch. 1895) 1063, at 1073. See also §§ 29, 30 *supra*.

²⁶ *Gault Lumber Co. v. Pyles*, 92 Pac. Rep. 175 (Okl. 1907).

²⁷ *McCullough v. Hitchcock*, 71 Conn. 404 (1899).

them beyond this must be specifically authorized or ratified by their principals to make them responsible. They have no implied authority from the nature of their business. They cannot bind their principals as to the terms of sale, or the damages which may arise from the breach of any contract for the purchase or sale of real estate.”²⁸ “Undoubtedly a broker may be given authority to contract, but the mere employment of a broker as such only authorizes him to act as an intermediary to bring the parties together.”²⁹

§ 41. Dissenting Opinions as to Incidental Power to Contract.

In the dissenting opinion in *Beattie v. Burt*, 122 App. Div. 473 (N. Y. 1907), it was said, though that was not the real point decided, that where a person has authority to sell land, as such he possesses authority to sign a contract. It was also said by the New York Court of Appeals in *Schultz v. Griffin*, 121 N. Y. 294, 299 (1890), though not in a dissenting opinion: “There seems to be no well-founded distinction between real and personal property, requiring a different construction of an agency for sale in the two cases. The great preponderance of authority now is that a power without restriction to sell and *convey* real estate gives authority to the agent to deliver deeds with general warranty binding on the principal, where, under the circumstances, this is the common and usual mode of assurance.”³⁰

In this case the agent was authorized to sell, in writing, but the writing does not appear to have contained any express authority to sign contract or deed. In the

²⁸ *Re Fairmount Cab Co.*, 9 Pa. Co. Ct. 202 (1890).

²⁹ *Rowland v. Hall*, 121 App. Div. 461 (N. Y. 1907).

³⁰ Citing *Le Roy v. Beard*, 8 How. (U. S.) 451; *Peters v. Farnsworth*, 15 Vt. 155; *Vanade v. Hopkins*, 1 J. J. March, 293; *Taggart v. Stanbery*, 2 McLean 543; *Rawie on Cov.*, § 20, note.

report of this case, the syllabus interprets the quotation given to mean that a power, without restriction, to sell and convey real estate "gives authority to the agent *to contract* to sell and convey by deed with general warranty where under the circumstances this is the common and usual mode of assurance." This was undoubtedly the intent of the quotation. In any event, as the case was decided on another point, the statement quoted may be regarded as merely a dictum.

§ 42. Ratification of Contract Signed by Agent.

"It is well settled that parol authority to the agent is sufficient to satisfy the requirements of the statute of frauds,³¹ and that such authority may be inferred and deduced from circumstances and a course of dealing; and that a contract made by an agent without authority may be ratified and adopted by subsequent conduct, and even by mere silence. Fry, Spec. Perf. (3rd Am. Ed.), § 509; Pom. Cont., §§ 77, 78; Wat. Spec. Perf., § 243; What. Ag., §§ 85-89."³²

In *Rowan v. Hyatt*, 45 N. Y. 138 (1871), the agent was authorized to receive proposals for the sale of property, and contracted in the owner's name to sell the property, and wrote the owner so, but the latter never received the letter, and later the owner was told of the sale but not of the signing of the contract. The owner subsequently wrote indicating that he was satisfied with the price, but when he learned that the broker had assumed to sign a contract for him he at once repudiated the transaction. Held, no ratification of the contract.

³¹ In considering this quotation (from a New Jersey case) it should be borne in mind that in that state, as well as in some others, the Statute of Frauds does not require the authority of an agent to sign a contract to be in writing. See §§ 29-35 *supra*.

³² *Keim v. Lindley*, 30 Atl. Rep. (N. J. Ch. 1895) 1063, 1064. See also *Ettinger v. Weatherhead*, 29 Ohio Cir. Ct. 137 (1906); *Newton v. Bronson*, 13 N. Y. 594 (1856).

§ 43. Liability of Agent for Signing Unauthorized Contract.

The liability of an agent for signing a contract which he had no authority to sign is considered in detail in a later chapter.³³

§ 44. Formalities where Agent has Authority to Sign Contract.

Where there is no question about the authority of a broker to enter into a formal contract for his principal, as where the broker has a power of attorney, and is therefore the attorney in fact of the principal as well as the broker in the transaction, or where he has other written authority to sign the contract, or where his authority to sign a contract, though oral, is not disputed, certain formalities should be observed. The contract should be made in the name of the principal, so that there can be no question that it is the principal who contracts, and not the agent. As to signature, "It is immaterial whether the agent signs his name to the instrument before or after the name of the principal. It is sufficient if the agent executes the paper in the name of the principal and not in his own name."³⁴ The agent may therefore sign "John Smith, as Agent for William Brown," or "William Brown, by John Smith, Agent," and the effect is the same in either case.

§ 45. Authority to Cancel or Surrender Contract.

An authority to make a contract for another is not sufficient to authorize its cancellation or surrender.³⁵

§ 46. Enforcing Contract Made by Agent.

Where a contract is signed by agents only in their

³³ See §§ 272-276 *infra*.

³⁴ *Worrall v. Munn*, 5 N. Y. 244 (1851).

³⁵ *Stillwell v. Mutual Life Co.*, 72 N. Y. 391, 392 (1878).

own names and there is no seal, an action can be maintained by and against the principals for whom these agents signed.³⁶ But if the contract is under seal, and the name of the principal is not disclosed, it can be enforced only against the parties to the instrument.³⁷ As has been said before, a contract for the sale of real estate in some jurisdictions need not be under seal.³⁸

Where an agent is appointed orally and, without disclosing his agency, makes a contract under seal in his own name for the purchase of real estate, the contract cannot be enforced against the principal afterward discovered.³⁹ On the other hand, the principal cannot sue on a sealed instrument made by an agent in his own name, even though the latter adds the word "agent" after his name, if he does not disclose for whom he is agent.⁴⁰ And the same rule applies where the contract was made by an officer of a corporation, as purchaser, and he designates himself as "president" and signs his name and adds thereto, "President of Buffalo Catholic Institute."⁴¹ In this case it was held that such additions are merely *descriptio personæ* and do not make the contract the contract of the corporation.

³⁶ Pelletreau v. Brennan, 113 App. Div. 806 (N. Y. 1906).

³⁷ Van Allen v. Peabody, 112 App. Div. 57 (N. Y. 1906). See also *Henricus v. Englert*, 137 N. Y. 488 (1893); *Loeb v. Barris*, 50 N. J. L. 384 (1888); *Haley v. Boston Belting Co.*, 140 Mass. 74 (1885).

³⁸ See § 32 *supra*, also § 354 *infra*.

³⁹ Briggs v. Partridge, 64 N. Y. 357 (1876).

⁴⁰ Schaefer v. Henkel, 75 N. Y. 378 (1878).

⁴¹ Buffalo Catholic Institute v. Bitter, 87 N. Y. 250 (1892).

CHAPTER V.

BROKER ACTING FOR BOTH PARTIES.

§ 47. General Statement.

A broker cannot, at the same time and in the same transaction, be acting for both parties (§§ 48-50), except:

- (1) Where both parties know that the broker is so acting. (§ 52.) Or
- (2) Where the broker is vested with no discretion. (§§ 53-57.)

The rule applies to an exchange as well as to a sale of property. (§ 51.)

Where the principal desires to avail himself of the fact that the broker accepted or agreed to accept commissions from both sides, he should plead it as a defense. (§ 58.)

§ 48. Broker Not to Act for Both Sides.

It is the broker's duty to act solely for and in the interest of his employer. This is implied in the contract. The employer is entitled to the disinterested efforts and judgment of the broker, and if the broker procures a purchaser for whom he is also acting as agent, without disclosing the fact to his employer, he is precluded from recovering any compensation.¹

The principal is entitled to the exercise in his behalf

¹ *Harten v. Loffer*, 31 App. D. C. 368, 369 (1908), (citing *Ralsin v. Clark*, 41 Md. 158, 161; 20 Am. Rep. 66; *Farnsworth v. Hemmer*, 1 Allen 494, 495; 79 Am. Dec. 756; *Rice v. Wood*, 113 Mass. 133, 135; 18 Am. Rep. 459; *Marsh v. Buchan*, 46 N. J. Eq. 595, 597; 22 Atl. 128; *Bell v. McConnell*, 37 Ohio St. 396, 399; 41 Am. Rep. 528; *Carpenter v. Hogan*, 40 Ohio St. 203; *Bollman v. Loomis*, 41 Conn. 581; *Murray v. Beard*, 102 N. Y. 505, 508; 7 N. E. 553; *Wilkinson v. McCullough*, 196 Pa. 205, 208; 79 Am. St. Rep. 702; 46 Atl. 357; *Warrick v. Smith*, 137 Ill. 504; 27 N. E. 709; *Hafner v. Herron*, 165 Ill. 242, 247; 46 N. E. 211).

of all the skill, industry and ability and the intensest fidelity of his agent. The agent is under the implied obligation of using the utmost good faith, candor and zeal in obtaining for his employer the best price for his property.²

A unique opinion is the one of Powell, J. in *Gann v. Zettler*, 60 S. E. 283 (Ga. 1908), where he writes: "It is recorded of Him 'who spake as never man spoke' that, 'seeing the multitudes, he went up into a mountain, and when he was set his disciples came unto him; and he opened his mouth and taught them, saying: * * * 'No man can serve two masters; for either he will hate the one and love the other, or else he will hold to the one and despise the other.' " ' So, also, is our law. Civ. Code, 1895, §§ 3010, 3011, 3014, 3018. Whoso, having undertaken the service of his master, counsels with another and agrees also to serve him in those same things wherewith he has been trusted, cannot claim the reward promised by his master unless he makes it plain that he has not acted privily, but that his master was consenting thereto."

§ 49. Acting for Both Parties a Breach of Contract.

"It is implied in every contract of agency that the agent shall use his best efforts to promote the interests of his principal, and it is ordinarily inconsistent with the proper discharge by a broker of his duty to one employer that he shall at the same time and in the same matter be acting for another. The interests of the seller and purchaser of property in the negotiation for its sale are adverse. It is the interest of the seller to get the highest price and of the purchaser to buy at the lowest. So when a broker to sell is at the same time the broker to buy, the fact of the double agency, if unknown to the

² *Roome v. Robinson*, 99 App. Div. 143 (N. Y. 1904).

principals, is a breach of his implied contract with each, and operates, or is likely to operate, as a fraud upon both.³ The law, therefore, to prevent fraud, and upon the most obvious reasons of justice and policy, will not in such a case enforce the contract for compensation, and this, irrespective of the consideration whether the sale made was or was not advantageous to the party from whom the compensation is claimed."⁴

§ 50. Acting for Both Parties Constitutes a Fraud.

Where a broker, ascertaining that a person desires to sell or exchange his property, calls upon him and is directed to see what he can do, and thereupon finds a purchaser or a party having property to exchange, and the fact is that he is also the agent of such other party, the broker can recover no commission from the owner, for if he acts under such employment it is his duty to act solely for and in the owner's interest.

This, although not expressed, is implied in the agreement. The owner is entitled to the disinterested efforts and judgment of his broker in the matter of the agency, and if the broker has procured a purchaser for whom he is also acting as agent without disclosing the fact to the owner, it constitutes such fraud as would preclude him from recovering any compensation.⁵

§ 51. The Rule Applies to Exchange of Property.

Even though the transaction is an exchange, the broker cannot recover commissions if he is intrusted

³ See *Plotner v. Chillson*, 95 Pac. 777 (Okl. 1908), referring to and quoting from *Campbell v. Baxter*, 41 Neb. 735; 60 N. W. 91, (citing *Rice v. Wood*, 113 Mass. 133; 18 Am. Rep. 459; *Walker v. Osgood*, 98 Mass. 348; 93 Am. Dec. 168; *Hollman v. Loomis*, 41 Conn. 581; *Meyer v. Hanchett*, 43 Wisc. 246; *Holcomb v. Weaver*, 136 Mass. 265; *Byrd v. Hughes*, 84 Ill. 174; 25 Am. Rep. 442; *Atlee v. Fink*, 75 Mo. 100; 43 Am. Rep. 385; *Scribner v. Collar*, 40 Mich. 375; 29 Am. Rep. 541).

⁴ *Duryee v. Lester*, 73 N. Y. 442 (1878), (citing *Everhart v. Searle*, 71 Penn. St. 259; *Farnsworth v. Hemmer*, 1 Allen 494; 79 Am. Dec. 756).

⁵ *Carman v. Beach*, 63 N. Y. 97 (1875).

with any discretion, and has an agreement to receive part of the commission from the other side, without the knowledge of both parties.⁶ But the rule does not apply to an exchange of property where the broker has no discretion but is simply to bring the parties together. In such case the broker is a mere middleman.⁷ Where the broker is a middleman in the transaction, he is not bound to inform his principal of his employment by the other side. In fact, in one case⁸ it was said: "Indeed, it may be said that defendant might reasonably assume that, in an exchange of property, a broker receives commissions from both sides."⁹ Where the contract provides that each of the parties is to pay the broker a commission, it would appear from the contract that they knew he was acting for both sides, and therefore, as stated in the following section, they cannot refuse his compensation.¹⁰

§ 52. Acting for Both Parties with Their Knowledge.

"When a broker is employed by both the vendor and the purchaser, neither can refuse compensation if he had knowledge that the broker held the same relation to the other party."¹¹ The burden of proof is, however, on the broker to show that the employer knew of the double employment.¹²

Where, after knowledge of the broker's receipt of pay from the other party, the principal still promises to pay the broker his commission, and especially where the prin-

⁶ *Norman v. Reuther*, 25 Misc. 161 (N. Y. 1898); *Hannan v. Prentis*, 124 Mich. 417 (1900).

⁷ *Clark v. Allen*, 125 Cal. 278 (1899).

⁸ *Marks v. O'Donnell*, 66 Misc. 147 (N. Y. 1910).

⁹ See also *Alvord v. Cook*, 174 Mass. 120 (1899).

¹⁰ *Willner v. Seale*, 127 App. Div. 180 (N. Y. 1908).

¹¹ *Jarvis v. Schaefer*, 105 N. Y. 289 (1887); *Tieck v. McKenna*, 115 App. Div. 701 (N. Y. 1906); *Lamb v. Baxter*, 130 N. C. 67 (1902); *Dennison v. Gault*, 132 Mo. App. 301 (1908); *Evans v. Rockett*, 32 Pa. Super. Ct. 365 (1907); *Weinhouse v. Cronin*, 68 Conn. 254 (1896); *M'Lure v. Luke*, 154 Fed. Rep. 650 (1907), (citing *Meyer v. Hanchett*, 43 Wisc. 246; *Scribner v. Collar*, 40 Mich. 375; *Leathers v. Canfield*, 45 L. R. A. 33; 117 Mich. 277; *Hobart v. Sherburne*, 66 Minn. 171; *Young v. Trainor*, 42 N. E. 139; 158 Ill. 428; *Hannan v. Prentis*, 124 Mich. 417; 83 N. W. 102).

¹² *Hannan v. Prentis*, 124 Mich. 417 (1900).

cipal actually pays something on account, he ratifies the broker's act.¹³

Where the buyer, who promised to pay the broker a commission, was told by the broker that the owner had placed the property with him and then attempts to escape payment of the promised commission, the jury may find that knowledge of the double employment existed.¹⁴ But in a Pennsylvania case it was held that an agreement to waive the rule of law that commissions cannot be recovered from both sides cannot be inferred from knowledge of the fact that such rule has been violated, or from silence, or failure to dissent at the time, or from all these combined.¹⁵

§ 53. Acting for Both Parties Not Unlawful in Itself.

“It is not *per se* unlawful for one to act as the broker for the buyer and seller without disclosing the fact. The broker may be a mere middleman. It is only when his employment is that of an agent with discretionary authority from his principal in the matter of such employment that he cannot accept payment from another whose interests conflict with those of the first principal.”¹⁶

§ 54. Broker Vested with No Discretion May Act for Both Parties.

As stated, a broker employed to buy or sell, who is vested with any discretion, or upon whom his employer has a right to rely for the benefit of his skill or judgment, loses his right to compensation if he agrees to act

¹³ Bonwell v. Auld, 9 Misc. 65 (N. Y. 1894). See §§ 67, 109-112 *infra*.

¹⁴ Geery v. Pollock, 16 App. Div. 321 (N. Y. 1897). See also § 51 *supra*.

¹⁵ Evans v. Rockett, 32 Pa. Super. Ct. 365 (1907).

¹⁶ Pollatschek v. Goodwin, 17 Misc. 591 (N. Y. 1896); M'Lure v. Luke, 154 Fed. Rep. 650 (1907), (citing Farnsworth v. Hemmer, 1 Allen (Mass.) 494; 79 Am. Dec. 756; Rupp v. Sampson, 16 Gray (Mass.) 401; Knauss v. Krueger Brewg. Co., 142 N. Y. 75; Empire St. Ins. Co. v. American Central Ins. Co., 138 N. Y. 449); Clark v. Allen, 125 Cal. 278 (1899), (citing Manders v. Craft, 3 Colo. App. 239).

in a similar capacity for the other party, but this does not apply to one simply employed to bring the parties together.¹⁷

“ A broker who is employed to sell property, and whose duty it is not only to find a purchaser but to negotiate the sale, cannot accept any compensation from any other person than his employer; and if he does make an agreement to be paid by the purchaser, or if he assume a position with reference to the transaction where his duty and interest might clash, he loses all right to his commissions from his employer. But that rule applies only to a case where the duty of the broker to his employer calls for the exercise of his judgment or discretion, when he must confine himself to acting for the person who employed him, and look solely to him for his reward. But when he is employed simply to find a purchaser upon terms fixed by his employer, his duty is performed by bringing to the seller one who is willing to purchase upon such terms. He has no discretion to exercise, and there is no reason why he should not be permitted to take from the purchaser such compensation as he may see fit to give for the benefit he has received by being informed of the fact that he would be able to make such a purchase.”¹⁸

§ 55. Compensation of Broker Without Discretion.

Where one acts as a middleman, merely bringing vendor and vendee together to make their own contract without aid, advice or interference to or on behalf of either, he may obtain compensation from both, even without knowledge of one of such arrangement with the other.¹⁹ The court in *Harten v. Loffler*, 31 App. D. C.

¹⁷ *Knauss v. Krueger Brewing Co.*, 142 N. Y. 70 (1894); *Lamb v. Baxter*, 130 N. C. 87 (1902).

¹⁸ *Gracie v. Stevens*, 56 App. Div. 203 (N. Y. 1900). As to when broker's duty is performed, see §§ 117-119 *infra*.

¹⁹ *Harten v. Loffler*, 31 App. D. C. 370 (1908), (citing *Ranney v. Donovan*, 78 Mich. 318, 329; 44 N. W. 276; *M'Lure v. Luke*, 154 Fed. 647; *Manders v. Craft*, 3

370 (1908) stated that whether this doctrine be sound to the full extent of want of knowledge by the respective parties it was unnecessary to inquire, as there was nothing in the facts of that case to which it could be applied.

Where the broker represents the purchaser and is to be paid by him, and he asks no commission from the vendor until after the vendor has accepted the offer submitted by the vendee, but the vendor then promises to pay a commission, the interests of the vendee are not affected by the commission from the vendor, and the broker may recover accordingly.²⁰

In *Davis v. Weber*, 46 Misc. 590 (N.Y. 1905), the owner paid the broker a commission for obtaining her tenant, and then, giving the tenant an option to purchase the property at a fixed price within a certain time, it was agreed that if the tenant exercised the option and bought, the owner was to pay the broker a commission on the sale. The tenant was later offered a price in excess of his option, and through the efforts of the broker obtained a purchaser at still higher figures and paid the broker a commission therefor. The tenant having exercised his option, it was held that the broker was entitled to recover his commission from the owner, although he also received a commission from the tenant, since the owner, by the execution of the lease and option, had debarred herself from selling to any one but the tenant, and thereby terminated any fiduciary relations between herself and the broker.

§ 56. General Rule as to Discretion.

“It is undeniable that where the broker or agent is invested with the least discretion, or where the party has the right to rely on the broker for the benefit of his skill

Colo. App. 236, 238; 32 Pac. 836; *Orton v. Scofield*, 61 Wisc. 382, 384; 21 N. W. 262; *Rupp v. Sampson*, 16 Gray 398, 401; 77 Am. Dec. 416; *Knauss v. Gottfried Krueger Brewg. Co.*, 142 N. Y. 70, 75; 36 N. E. 867).

²⁰ *Jones v. Henry*, 15 Misc. 153 (N. Y. 1895). And see § 121 *infra*.

or judgment, in any such case an employment of the broker by the other side in a similar capacity, or in one where by possibility his duty and his interest might clash, would avoid all his right to compensation. The whole matter depends upon the character of his employment. If A is employed by B to find him a purchaser for his house upon terms and conditions to be determined by B when he meets the purchaser, I can see nothing improper or inconsistent with any duty he owes B for A to accept an employment from C to find one who will sell his house to C upon terms which they may agree upon when they meet. And there is no violation of duty in such case in agreeing for commissions from each party upon a bargain being struck, or in failing to notify each party of his employment by the other.”²¹

§ 57. Reason for the Rule.

In *Empire State Ins. Co. v. American Central Ins. Co.*, 138 N. Y. 446, 449, 450 (1893), the court said: “It is not doubted that the same person may sometimes act as agent for the two parties in the same transaction. But he can do so only in case he has no discretion to exercise for either party. An agent to sell for one party may also act as agent for the buyer, but only in case the price and terms of sale have been fixed by each party, so that nothing is left to his discretion. But an agent to sell, intrusted with a discretion, and thus bound to obtain the best price he can, cannot buy for himself or as agent for another. In such a case he would occupy antagonistic positions and there would be a conflict of interests. He could not faithfully serve the one party without betraying the interests of the other. He would at least be under great temptation to betray the interest of one of the parties. So a person may sometimes act

²¹ *Knauss v. Krueger Brewg. Co.*, 142 N. Y. 75 (1894).

as agent of both parties in the making of any contract. But he cannot do so when he is invested with a discretion by each party, and when each is entitled to the benefit of his skill and judgment. The rules of law upon this subject have been laid down and illustrated in many cases, of which it is sufficient for the present purpose to cite the following: *Utica Ins. Co. v. Toledo Ins. Co.*, 17 Barb. 132; *Rett v. Washington Marine and Fire Ins. Co.*, 41 Barb. 353; *N. Y. Central Ins. Co. v. National Fire Ins. Co.*, 14 N. Y. 85; *Claffin v. Farmers' & Citizens' Bank*, 25 N. Y. 293; *Murray v. Beard*, 102 N. Y. 505, 509; *Porter v. Woodruff*, 36 N. J. Eq. 174; *Michoud v. Girod*, 4 How. (U. S.) 503.

“ Contracts thus negotiated are void at the option of any non-assenting party thereto. The policy of the law condemns them. It matters not that the agent has acted fairly and honestly, and even that neither party to the contract has suffered injury. It is enough to condemn the contract that the common agent in fact had any, even the least, discretion to exercise for the parties. As said by the Chancellor in *Porter v. Woodruff*, ‘ So jealous is the law upon this point that it will not even allow the agent or trustee to put himself in a position in which to be honest must be a strain upon him.’ ”²²

§ 58. How Question of Double Employment Is Raised.

Where the principal desires to avail himself of the fact that the broker accepted or agreed to accept commissions from both sides, he must plead it as a defense.²³ In *Norman v. Reuther*, 25 Misc. 161 (N. Y. 1898), (citing *Chatfield v. Simonson*, 92 N. Y. 209), it was said that while the owner did not plead affirmatively that the broker was acting for both sides, without the knowledge

²² This case cited in *Hartford Fire Ins. Co. v. McKenzie*, 70 Ill. App. 624.

²³ *Bonwell v. Auld*, 9 Misc. 65 (N. Y. 1894).

of both, proof of it may be made where the answer denies the performance of the services.²⁴ But in *Duryee v. Lester*, 75 N. Y. 442 (1878), the Court of Appeals remarked that if one of the parties to a deal desires to avoid liability on the ground that the agent has agreed for commissions from both sides, it seems the better practice is to plead it and not to rely on a mere general denial.²⁵

²⁴ See also *Brierly v. Connelly*, 31 Misc. (N. Y.) 268, to same effect, and *Wolff v. Denbosky*, 36 Misc. (N. Y.) 643, where a general denial was held sufficient to raise the question.

²⁵ See 1 Chitty on Pl., 501.

CHAPTER VI.

BROKER'S RIGHT TO INTEREST IN PROFITS.

§ 59. General Statement.

Neither an agent, nor those in his employ, may be interested in the profit of a sale to or purchase from his principal without the clear assent of the principal. (§§ 60-64.) That the intention was honest, or that the principal suffered no loss by the transaction, makes no difference. (§§ 65, 66.)

Such a transaction is not, however, void, but is voidable at the option of the defrauded party, and may be ratified by him. (§ 67.) And where the principal knows that the agent is acting in his own behalf, the transaction is valid. (§§ 68, 69.)

Where others combine with the broker to carry through a transaction in the profits of which the broker is secretly interested, they may all be liable for fraud or deceit. Such a combination is usually sought to be held liable on the theory of a conspiracy. (§ 70.) Sharing in the benefits of such a transaction makes one liable, even though unaware of the wrong committed. (§ 71.)

In New York, a conspiracy to defraud another out of property by criminal means is a misdemeanor. And so is corrupt influencing of an agent. And under the New York statute, an agent may also commit a misdemeanor by accepting a gratuity or a promise under an understanding that he shall act in a particular manner in his principal's business. (§ 70.)

§ 60. Agent Must Act in Interest of Principal.

A person may agree with the owner of property to buy it at a certain price, and then turn around and agree to sell it to somebody else at an advanced price, and may, as a matter of right, make all he can so long as the purchaser gets all he bought, and pays no more than he agreed to pay, and is not, in fact, damaged.

But this rule does not apply where the person who makes the profit is the agent of either party and makes the profit out of the party whom he represents.¹ "It is the unquestionable duty of an agent to act in matters touching the agency with a sole regard to the interests of his principal. The agent in accepting the employment undertakes to manage the interests confided to him and discharge the trust reposed in him to the best of his ability for the benefit of his principal."²

Some cases go to the length of holding that the broker may not accept part of the commission of the broker acting for the other party.³

On the other hand, in *Alvord v. Cook*, 174 Mass. 120 (1899), the plaintiffs, while acting as the defendants' brokers, made an agreement with a person acting as broker for the other party to an exchange that the brokers for the contracting parties should share equally the commissions obtained on both sides. It was claimed that this arrangement was not known to the defendants, and was a fraud upon them. The arrangement was not such as to make the respective brokers partners, and it did not appear whether the commissions of the respective brokers were to be lump sums or percentages, or whether they were to be equal in amount.

The court said: "It is easy to conceive of an arrange-

¹ *Helberg v. Nichol*, 149 Ill. 249 (1894).

² *Price v. Keyes*, 62 N. Y. 382 (1875); *Kingsley v. Wheeler*, 95 Minn. 362 (1905); *Leathers v. Canfield*, 45 L. R. A. 33 (Mich. 1898).

³ See *Plotner v. Chillson*, 95 Pac. 777 (1908), (citing *McKinley v. Williams*, 74 Fed. 95; 20 C. C. A. 313).

ment between brokers for sharing the commissions which would put one of them under a temptation to act adversely to the interest of his client, and perhaps it is easier to conceive of such an arrangement than of one not having such an effect, but we are not prepared to say that necessarily, as matter of law, every arrangement between brokers to share commissions changes the relation they hold to their principals, either by putting them under an additional or different temptation than that arising out of the nature of the employment or otherwise, and is therefore invalid.

“ In this case there was an exchange of property, and it is fair to assume that the property upon each side was substantially of the same value; and it does not appear that the commissions were unequal.

“ The defendants fail to show that, upon the facts of this case, either broker was placed by this arrangement in any better or worse condition than without it, or that in any way he was subjected to any other or different temptation to act adversely to the interests of the principal than that naturally and ordinarily arising out of the nature of his employment.”

If the person who makes the profit is not the agent of either party, it seems no inference may be drawn from the fact that he ascertained first whether the purchaser would give a certain amount before the party who makes the profit agrees to buy the property at a less amount.⁴

§ 61. Agent Must Not Be Personally Interested.

“ It is established by the authority of elementary writers and by a long course of decisions that a person employed as an agent in any respect cannot be held to act for his own benefit, and must account to his principal for any profit he may have made in the transaction.”⁵

⁴ Healey v. Martin, 33 Misc. 236 (N. Y. 1900).

⁵ Carruthers v. Diefendorf, 66 App. Div. 33 (N. Y. 1901).

In *Fellows v. Northup*, 39 N. Y. 122 (1868), the court said: "The rule is well settled also that an agent can have no personal interest in the subject-matter of the agency, and cannot act when he is so concerned. The law of agency proceeds upon the idea that the agent is devoted to the interests of his principal, and that his judgment, his feelings and his interests all concur in the discharge of his duty. An agent employed to sell cannot buy. An agent employed to buy cannot himself be the seller, nor can a trustee be interested in the subject of the trust."⁶

§ 62. Agent May Not Also Act as Principal.

In *Clark v. Bird*, 66 App. Div. 284 (N. Y. 1901), the court quotes from *Story on Agency* to the effect that "an agent employed to sell, cannot himself become the purchaser; and an agent employed to buy, cannot himself be the seller. So an agent, employed to purchase, cannot purchase for himself."⁷

In *Wheeler v. Bell*, 88 Hun 100 (N. Y. 1895), the then General Term of the Supreme Court in New York refused to interfere with a verdict *against* real estate brokers who secured an option for a certain price and then turned the property over to their principal at an increased price. An agent to sell cannot himself become the purchaser, and one who undertakes to act for another in any matter cannot in the same matter act for himself.⁸

"Where one undertakes to act as agent for another in the sale of property the rule is inflexible that he violates his trust by becoming the purchaser from his principal, unless the assent of the latter is established by most

⁶ *Gardner v. Ogden*, 22 N. Y. 327 (1860), reviews many of the authorities. See also Vol. 2, Abb. N. Y. Cy. Dig., 632.

⁷ Citing *Dutton v. Willner*, 52 N. Y. 312; *Conkey v. Bond*, 36 N. Y. 427; *Ten Eyck v. Craig*, 62 N. Y. 406, 419. See also *Finch v. Conrade*, 154 Pa. St. 326 (1893); *Cornwell v. Foord*, 96 Ill. App. 366 (1901); *Albertson v. Fellows*, 45 N. J. Eq. 310; *Amick v. Butler*, 111 Ind. 518.

⁸ *Bain v. Brown*, 56 N. Y. 285 (1874).

convincing proof. This principle is based upon good morals and good sense. As was said by Judge Story in his work on Agency (§ 210): 'It may be correctly said, with reference to Christian morals, that no man can faithfully serve two masters whose interests are in conflict. If, then, the seller were permitted, as the agent of another, to become the purchaser, his duty to his principal and his own interest would stand in direct opposition to each other; and thus a temptation, perhaps in many cases too strong for resistance by men of flexible morals or hackneyed in the common devices of worldly business, would be held out which would betray them into gross misconduct, and even into crime. It is to interpose a preventive check against such temptations and seductions that a positive prohibition has been found to be the soundest policy, encouraged by the purest precepts of Christianity.' ''⁹

§ 63. Agent May Not Make Secret Profits.

A real estate broker who receives a price in excess of that reported and accounted for to his principal is liable to the principal for the difference.¹⁰ And so a real estate agent who induces the owner to fix a net price upon certain property upon the supposition that a sale is to be made to a third party cannot himself purchase the property and by such transaction realize a greater profit than a reasonable commission.¹¹

This doctrine was enforced in the New York courts in *Bain v. Brown*, 56 N. Y. 285 (1874),⁹ in which an agent authorized to sell real estate of his principal contracted to sell the same for \$17,000 and advised his principal of the sale. The next day, other parties applying to purchase the property, he opened negotiations for a sale to

⁹ *Clark v. Bird*, 66 App. Div. 284 (N. Y. 1901).

¹⁰ *Babcock v. De Mott*, 160 Fed. 882 (1908).

¹¹ *Merriam v. Johnson*, 86 Minn. 61; 90 N. W. 116 (1902).

them which resulted in his giving his own name as vendor and selling the property for \$26,000. He then took an assignment of the first contract, and procured his principal to deed direct to the parties with whom he had contracted, on the representation that the purchaser under the first contract had assigned to them. The price to be paid under the second contract he did not communicate to his principal. He received the \$26,000, accounting to his principal only for the \$17,000. In an action to recover the balance the Court of Appeals held that, assuming the first sale to have been in good faith, the agent could not rightfully appropriate to himself the advance upon the second sale, but that the principal was entitled to the benefit thereof. The officers of a corporation are its agents, and the rule applies to them.¹²

Where the broker is to receive for his compensation all in excess of a fixed net price, it has been said that he need not disclose to the vendor the terms of the sale.¹³

§ 64. Broker's Employees Governed by Same Rules.

The same principles apply to a clerk of the broker. Whatever duty the broker owes to the seller, the clerk equally owes the same. The disability extends to all persons who being employed or concerned in the affairs of another acquire a knowledge of his property. "The honesty and fairness of transactions between principals and their agents demand a firm adherence to these rules, and to bring within their operation, not only the agent himself but those in his immediate employ, and who are engaged in the transaction of his business, which is, necessarily, the business of the agent's principal."¹⁴

¹² *McCloskey v. Goldman*, 62 Misc. 464 (N. Y. 1909). And see *Fry v. Platt*, 32 Kans. 62 (1884), where the agent sold to his own partner. *Cf. Boqua v. Marshall*, 114 S. W. 714 (Ark. 1908).

¹³ *Fulton v. Walters*, 216 Pa. St. 56 (1906).

¹⁴ *Gardner v. Ogden*, 22 N. Y. 349, 350 (1860); *Powers v. Black*, 159 Pa. St. 153 (1893).

§ 65. Rule Not Affected by Agent's Honesty of Purpose.

It is no answer to a complaint that brokers have acted for themselves in a transaction involving their principal, that their intention was honest and that the brokers did better for their principal by selling him their own property than they could have done by going into the open market. The rule is inflexible, and although its violation in the particular case cause no damage to the principal, he cannot be compelled to adopt the purchase.¹⁵ The fact that the agent volunteered his agency does not absolve him from the duty of fidelity. Neither is it material to inquire whether the agent had any actual fraudulent purpose. The making of a purchase from himself without authority from his principal is a constructive fraud in view of the fiduciary relation.¹⁶

§ 66. Act of Agent in His Own Interest Presumed Injurious.

"It is a well-settled principle of morals as well as of law that the agent must faithfully serve his principal. However unquestioned may be the honesty of the agent, or his impartiality between his own interests and those of his principal, he is bound to the exercise of all his skill, ability and industry in favor of his principal. As an agent to sell, it is his duty to get the highest fair price; and this duty is wholly incompatible with his wish to buy. In every trust this principle prevails. No agent or trustee can deal with the subject-matter of his trust, except for the benefit of his principal * * *. And the rule in equity is, that any act by an agent in respect

¹⁵ *Tausig v. Hart*, 58 N. Y. 425 (1874); *Hare v. De Young*, 39 Misc. 368 (N. Y. 1902); *Mullen v. Bower*, 22 Ind. App. 302, 303 (1898), (citing *Clendenon v. Pan-coast*, 75 Pa. St. 213; *Soule v. Deering*, 87 Me. 365; 32 Atl. 998; *Hammond v. Book-walter*, 12 Ind. App. 177; *Everhart v. Searle*, 71 Pa. St. 256; *Pratt v. Patterson's Ex.*, 112 Pa. St. 475; 3 Atl. 858; *Wadsworth v. Adams*, 138 U. S. 380).

¹⁶ *Conkey v. Bond*, 36 N. Y. 427 (1867). See also *Porter v. Woodruff*, 36 N. J. Eq. 174.

to the subject-matter of the agency, injurious to the principal, may be avoided by the principal, and where an agent to sell becomes the purchaser, the court will presume that the transaction was injurious, and will not permit the agent to contradict the presumption.¹⁷ The policy of this rule is obvious. The confidence reposed in the agent must not be abused. His position of trust must not be employed to his own advantage, or to the injury of his principal. In short, while in the employment of his principal, his principal's interest must be his interest, and he may have no interest which, conflicting with those of his principal, can work injury to the latter."¹⁸

§ 67. Act of Agent in His Own Interest Voidable, but May Be Ratified.

Such a transaction is voidable at the election of the defrauded party, and if, with full knowledge of all the facts, he deliberately and freely ratifies the act of the agent, he thereby waives his right to repudiate it. Ratification between the original parties, however, implies a conscious and intended approval of the act done. It rests in the intention. That intention is generally one of fact to be deduced from all the circumstances.¹⁹

§ 68. Agent May Be Personally Interested with Consent of Principal.

While the general rule that an agent cannot himself be interested in a deal holds, yet the agent may be personally interested therein if the principal knows of the facts.²⁰ But the mere fact that the property was to be sold at a fixed price does not make the rule inapplica-

¹⁷ Citing *Coles v. Theothick*, 9 Ves. 234, 247.

¹⁸ *McDonald v. Lord*, 26 How. Pr. 407 (N. Y. 1864).

¹⁹ *Clark v. Bird*, 66 App. Div. 284 (N. Y. 1901). See §§ 68, 69 *infra*.

²⁰ *Kingsley v. Wheeler*, 95 Minn. 363 (1905).

ble.²¹ “It is not always the case that a broker may not purchase for himself. If it is apparent that in making the purchase his object is to acquire title for himself, and the seller contracts with him with a knowledge of this fact, or the facts connected with his purchase are of such a character that notice could be implied that he was dealing with the broker as purchaser, and not as his broker, we see no reason, in such a case, for the application of the rule that an agent will not be permitted, to his own advantage, to deal with the property of his principal.”²²

§ 69. Broker Without Discretion as Disclosed Principal or Subsequent Purchaser.

In *Pomeroy v. Wimer*, 167 Ind. 440 (1906), the court, at pages 450-452, first discusses the rule that an agent with discretionary power to sell or exchange must exercise that discretion for the sole benefit of his principal, but where he acts as a mere middleman he may act for both parties.²³ The court then said: “If an agent, under the limitations and terms above stated, may act for both parties, and recover compensation from both, there can be no sound reason why one who engages, under similar restrictions, to find a purchaser or trader for another may not himself become the purchaser or trader, as well as a stranger, provided that in doing so he violates no obligation, and fully discloses to his employer his personal relations to the subject-matter. The fact that he has undertaken to find a purchaser for the property does not impress upon the agent any particular incapacity to buy or trade for the property himself, nor make a trade with him less profitable to his employer. And if the principal, with full knowledge of all the material facts

²¹ *Ruckman v. Bergholz*, 37 N. J. L. 441 (1874).

²² *Texas Brokerage Co. v. Barkley*, 109 S. W. 1002 (Tex. 1908).

²³ See §§ 48-57 *supra*.

concerning the transaction, enters into negotiations with him and consummates a trade, the transaction is valid and the agent entitled to his compensation.²⁴ In the case of *Stewart v. Mather*, 32 Wis. 344 (1873), it is said: 'Where the broker merely engages to find a purchaser at such price as may be agreed upon, if he presents himself as such purchaser and the seller, with full knowledge of that fact, so receives and enters into negotiations with him and a sale is consummated, the broker may recover his commissions.' "

In another case,²⁵ it was held that when the agent has fully discharged his trust and sold property to a third person in good faith, having no interest in the same at the time, he may afterwards acquire the title from the purchaser, and such fact, or the fact that his wife acquired the title, will not afford ground for avoiding the sale.

§ 70. Broker May Not Lawfully Combine with Others to Secure Secret Profits.

Sometimes others combine with the broker in putting through a deal in which the broker is secretly to share in the profit of a sale to or purchase from his principal.²⁶ Again, at other times, a broker may use a "dummy" to represent either a supposed buyer or seller, as the case may be, in endeavoring to or in actually putting through such a deal.

The principles which govern an action for fraud and deceit are the same, whether the fraud is alleged to have originated in a conspiracy or to have been solely committed by a defendant without aid or co-operation.

²⁴ Citing *Rochester v. Levering*, 104 Ind. 562 (1886); *Stewart v. Mather*, 32 Wis. 344 (1873); 1 *White & Tudor's Leadg. Cases in Equity*, Part 1, p. 219; *Burke v. Bours*, 98 Cal. 171 (1893); 32 Pac. 980; 1 *Clark & Skyles on Agency*, § 413; 1 *Am. & Eng. Ency. Law* (2nd Ed.), 1081.

²⁵ *Board of Trustees v. Blair*, 45 W. Va. 820 (1899), (citing *Walker v. Carrington*, 74 Ill. 446).

²⁶ See, for illustration, *Emmons v. Alvord*, 177 Mass. 406 (1901). And see §§ 251-256 *infra*.

Where fraudulent profits are secured by means of combination, its members are usually sought to be held liable on the ground of conspiracy.

In New York a conspiracy to defraud another out of property by criminal means is a misdemeanor, as is also corrupt influencing of an agent and the acceptance by an agent of a gratuity or a promise to influence his acts towards his principal's business.

The whole matter of fraudulent acts of brokers is considered at length in Part IV of the present work. For a consideration of the liability of the broker and the principal see Part III of the present volume, Chapters XXVI-XXVIII *infra*.

§ 71. Person Sharing Benefits Liable though Unaware of Fraud.

The legal rights and liabilities of parties may be affected by the acts and representations of others of which they had no knowledge, where they have received the benefit of the contracts induced by such acts and representations.²⁷

An agent cannot be interested in the profit of a sale to his principal, and even though a person is not a party to an agreement to share the profit, he becomes liable to account under an allegation that he received and kept a share of the profit.²⁸ The defrauded party's right of recovery does not depend upon any conscious participation of the "dummy" or the gainer in the alleged fraud, nor upon his accepting the fruits of it with knowledge that it was committed. The burden of proof is on the gainer to show the fairness and honesty of the transaction.²⁹

²⁷ Dutton v. Willner, 52 N. Y. 317 (1873). See the fuller discussion of this subject in §§ 254-256, 261 *infra*.

²⁸ Colonizers Realty Co. v. Shatzkin, 129 App. Div. 609 (N. Y. 1908).

²⁹ Ringler v. Reynolds, 18 N. Y. Suppl. 877; 46 N. Y. St. Rep. 612 (1892); *aff'd*, without opinion, 139 N. Y. 613 (1893).

CHAPTER VII.

GENERAL AUTHORITY OF BROKER.

§ 72. General Statement.

As a general rule the broker has no authority to sign a contract of sale for his employer. (§ 27.)

A broker employed to sell property has no authority, as such, to receive payment therefor. Such authority may, however, be expressly given, or may be implied where the broker has possession of the property, or assignments of it, or other indicia of authority for its transfer. (§ 73.)

Where there is no authority for employment of sub-agents, either express or implied, and the broker employs other brokers for his own convenience, no privity of contract arises between the principal and such sub-agents, but subsequent ratification of the employment of the sub-agent has in some cases been held sufficient to permit a recovery direct from the principal. (§ 74.)

A renting agent is usually given authority to rent property, to receive the rent, and give receipts in the name of the landlord, and also to allow deductions from the rent for the expense of minor repairs, janitor service, etc., but has no authority to execute a lease unless such authority is expressly given him.¹ (§ 75.) A renting agency is terminated by the death of the principal. (§ 76.)

In New York, the agent of the landlord may institute dispossess proceedings. (§ 77.)

Real estate brokers who carry on a general insurance

¹ See N. Y. Real Prop. Law—Cons. Laws, Ch. 50, §§ 242, 250.

business are usually not the agents of the insurance company, but are regarded as the agents of the insured. (§ 78.)

§ 73. Agent's Authority to Receive Payment for Property Sold.

"The general doctrine is, that a broker employed to sell has no authority as such to receive payment. Exception is made to this general rule in some cases where the principal is not disclosed."²

"A factor who has the possession of property, or who has assignments of it, or other indicia of authority to transfer it, has implied power to receive the purchase price for the vendor when he sells and delivers the property, or the title deeds to it.³ But a broker or other agent to sell property who has concluded a contract of sale, which is to be performed by a delivery of the property, or the title deeds to it, and the simultaneous payment of the purchase price at some future time, and who is not intrusted with the possession of the property, or of the conveyance of it, has no implied authority to collect the purchase price, or to extend its time of payment, or to otherwise modify the contract between the vendor and the purchaser."⁴

§ 74. Broker's Power to Employ Other Brokers.

Where a broker is authorized to sell property and engages another broker to help him, and agrees to divide the commissions in case of a sale, the latter cannot recover commissions from the owner of the property, or from the employer of the first broker, but must look to

² *Higgins v. Moore*, 34 N. Y. 419 (1866). See also cases under § 46.

³ *Citing Pickering v. Busk*, 15 East, 38; *Baring v. Corrie*, 2 Barn. & Ald. 137, 148.

⁴ *Adams v. Fraser*, 82 Fed. 213 (1897), (citing *Butler v. Darman*, 68 Mo. 298, 301; *Selple v. Irwin*, 30 Pa. St. 513; *Halmenfeld v. Wolff*, (Com. Pl.), 36 N. Y. Supp. 473; *Clark v. Murphy*, 164 Mass. 490; 41 N. E. 674; *Higgins v. Moore*, 34 N. Y. 417, 419; *Kane v. Barstow* (Kans. Sup.), 22 Pac. 588).

the broker who gave him the property for sale.⁵ This, some authorities say, is so, because an agent in charge of property and authorized to sell the same has no power, as a matter of law, to delegate his authority to another person or employ a subagent. Thus, in *Groscup v. Downey*, 105 Md. 277 (1907), the court said: "The law is firmly settled that ordinarily an agent has no power to delegate his authority to another or to employ a subagent in the absence of an express or implied authority to do so from his principal. This is especially true where the execution of the power conferred upon the agent involves the exercise of judgment or skill.⁶ The power to an agent to delegate his authority may be implied from a variety of circumstances, as where it is shown that the principal contemplated or knew that the agent intended to delegate his authority, or where such delegation is authorized by custom, usage, the course of trade or by necessity, or where the acts to be performed are merely mechanical or ministerial.⁷ If the authority of the agent is conferred on him by a written instrument, the construction of the instrument and the determination of the nature and extent of the agent's power are matters of law for the Court. If the agency grows out of transactions *in pais* or is to be inferred from the conduct or relation of the parties to each other, the existence of the agency and the nature and extent of the agent's powers are questions of fact to be found by the jury from the evidence before them under proper instructions from the Court."

And it has been held that even if the acts of a subagent, who has been employed without authority, are afterwards ratified, he can recover no compensation from the principal, but must look to the agent.⁸ On the other

⁵ *Hill v. Morris*, 15 Mo. App. 330 (1884); *Watkins Co. v. Thetford*, 96 S. W. 72 (Tex. 1906).

⁶ Citing *Meehem on Agency*, § 185; *Clark & Skyles on Agency*, p. 767 *et seq.*; *Wilson v. York, etc., R.R. Co.*, 11 G. & J. 74.

⁷ Citing *Clark & Skyles on Agency*, p. 770; *Meehem on Agency*, §§ 184-196.

⁸ *Carroll v. Tucker*, 2 Misc. 397 (N. Y. 1893); *Southack v. Ireland*, 109 App. Div. 45 (N. Y. 1905).

hand, there is authority supporting a somewhat contrary view, while courts have also gone to the length of seeking, in some instances, sufficient basis for permitting the second broker to recover direct from the owner or the first broker's employer, on the ground that there was an independent employment of the second broker by the owner.

Where one broker "gives" the property to another broker and after unsuccessful efforts the owner deals direct with the second broker, it has been held in *Peek v. Slifer*, 122 Ill. App. 21 (1905), that the first broker is not entitled to commission, the employment of the second broker being considered an independent arrangement. The word "gives" in the foregoing sentence is used in the sense in which it has become popularized among real estate brokers. When one broker informs another of the fact that certain property has been placed with him for sale, it is usually spoken of as the one broker "giving" the property to the other. It is evident, of course, that the meaning is that he gives the other the information.

Where one broker employed another, and the arrangement was ratified and adopted by the principal, the court permitted a recovery by the second broker direct from the principal.⁹ But in this case the facts were that the principal appointed the first broker as the agent to sell the property and referred the second broker to such agent, and the case went on the theory that the first broker was acting as the agent of the principal in the transaction, a situation different from the ordinary one in which one broker transmits to another the property he has for sale.

In *Wefel v. Stillman*, 44 So. 203 (Ala. 1907), plaintiff was employed by the owner to sell his land. Plaintiff employed defendant, also a broker. Defendant sold the

⁹ *Com. & Inv. Co. v. Real Estate Co.*, 120 Mo. App. 437 (1906).

land, but claimed he sold it under a direct authority from the owner. The court said: "The appellee insists that the appellant was estopped from setting up that he sold the land under an independent contract with the owner and relies on the general equitable doctrine that an agent or other fiduciary cannot acquire an interest in the subject-matter of the agency adverse to his principal which is set out in *Waller v. Jones*, 107 Ala. 341; 18 So. 277, and in *S. U. N. Co. v. Dangaix*, 103 Ala. 394; 15 So. 956, and other cases. But, while accepting that principle to its full extent, we do not think it applies here, so as to prevent the owner and the defendant from entering into an independent contract. Certainly if the agency between defendant and plaintiff was limited to a single purchaser, the relation would be at an end when that proposed purchase fell through; and there would be no principle of law forbidding a contract of agency between the owner of the property and the defendant, 103 Ala. 394, *et seq.*; 15 So. 958. The plaintiff had no interest in the property. At most, he had a contract allowing him to find a purchaser for the land by his own efforts or those of his agents; and, of course, if he authorized the defendant to act under his power, and the defendant, so acting, found a purchaser, the plaintiff would be entitled to share in the commission. But such a contract is unilateral, binding upon neither party until the defendant, proceeding under the offer, has procured a purchaser.¹⁰ There was a right in the owner to employ other persons than the plaintiff to sell, and a right in the defendant to contract independently with him; and if he did in fact so contract, not proceeding under the privilege extended by the plaintiff, it would be a renunciation of any contract relation with the plaintiff, and any commissions earned would belong to the defendant, and the plaintiff, at most, would have to sue for damages, if there was such a con-

¹⁰ Citing *Sheffield F. Co. v. H. C. & C. Co.*, 101 Ala. 477; 14 So. 672.

tract as would, on its breach, support an action. We do not think the principle invoked by the appellee has any application to this case, except upon the factum of the defendant's service being rendered to the owner for the plaintiff, or in pursuance of the engagement with the plaintiff. The contract between plaintiff and defendant did not *per se* transfer to the plaintiff any lien or property right to defendant's labor, or put any obligation on the defendant to proceed under the offer extended to him by the plaintiff, or restrict his or the owner's right to contract as principals, so as to pass any property right to the plaintiff in the wages of defendant in a service to the owner under an independent contract. But, of course, any breach by defendant of any binding contract with the plaintiff gives to the latter a plain remedy at law for his full damages."

If the owner lists property with the broker for sale and authorizes the broker to relist the land with other brokers, the latter, in order to recover from the owner direct, must show the authority of the former broker to do so, or that after the first broker placed the land with the second brokers the owner, being aware of such fact, consented to the latter brokers selling the land.¹¹

Where one broker is given the property to sell, and he employs another broker to sell it, and agrees to divide the commission, the latter broker may recover his share of the commission from the former.¹²

But where there is no agreement between the brokers to divide commissions, nor anything from which such an agreement may be implied, the subagent cannot recover from his employer, the other broker, merely upon proof that where two brokers bring about a deal it is customary to divide the commissions. Usage cannot create a contract.¹³

¹¹ *Sterling v. De Laune*, 105 S. W. 1169 (Tex. 1907).

¹² *Kaufman v. Bloch*, 5 Misc. 404 (N. Y. 1893).

¹³ *Hedenberg v. Seeberger*, 140 Ill. App. 618 (1908).

§ 75. Renting Agents.

The ordinary agency to collect rents usually includes authority to rent, to receive rent money and receipt therefor in the name of the landlord; also to allow deductions from the rent for cost of minor repairs, janitor service, etc., but does not include authority to execute a lease unless such authority is expressly conferred. The extent of the agent's power is usually agreed upon, or otherwise is established by the acts of the agent ratified by the principal. A renting agent is not liable for failure to rent property in the absence of proof that he could with reasonable diligence have rented it to any person who could, or would, have paid any rent therefor.¹⁴ Where the meaning of the agreement is uncertain, proof of custom is admissible to show that a renting agent is responsible for the care of the property while vacant, under an agreement to take "care" of the property for a commission on collections.¹⁵

An agent to rent premises and collect rent, where the lease is for a term of more than one year and under seal, has no implied power to consent to the substitution of a new tenant.¹⁶ And an agent in regard to the collection of rent and the ordinary repairs that a real estate agent makes in behalf of the owner has no power to agree to pay for, or even to authorize, extensive improvements, such, for instance, as the removal of partitions for the purpose of changing a number of small rooms into larger rooms and painting and plastering these rooms.¹⁷ "An agent authorized to receive payment can receive it in money only. Ordinarily he can receive it when it becomes due and not before. He cannot commute the debt for another thing. He cannot compound the debt, or release it on composition, or sub-

¹⁴ *Burpe v. Van Eman*, 11 Minn. 327 (1866).

¹⁵ *Cameron v. Real Est. Co.*, 76 Mo. App. 366 (1898).

¹⁶ *Wallace v. Dinniny*, 11 Misc. 317 (N. Y. 1895).

¹⁷ *Garber v. Spivak*, 65 Misc. 37 (N. Y. 1909).

mit it to arbitration.”¹⁸ An agent authorized to collect rents is not to be presumed to have authority to receive rents before they are due, and such prepayment does not discharge the tenant unless the landlord ratifies the payment or receives the money paid.¹⁹

§ 76. In General, Renting Agency Terminates on Death of Principal.

The power of an agent to collect and receive payment of rents, when such power is not coupled with an interest, terminates and ceases upon the death of the principal. Payment made to the agent after the principal's death does not bind the estate of the principal though the payment be made in ignorance of the principal's death, unless perhaps where the agent has accounted for same to the estate.

“ The rule seems to have originated in the presumption that those who deal with an agent knowingly assume the risk that his authority may be terminated by death without notice to them. The case of an agency coupled with an interest is made an exception to the rule.” It is possible, however, to so word a lease that the personal representatives or the estate of the principal may be estopped from recovering money paid to his agent in good faith after his death.²⁰

§ 77. Agent's Right to Dispossess Tenants. New York Rule.

Section 2235 of the New York Code of Civil Procedure expressly authorizes the agent of the landlord to make application for the removal of the tenant, and in *Case v. Porterfield*, 54 App. Div. 109 (N. Y. 1900), it was held

¹⁸ *Fellows v. Northup*, 39 N. Y. 121, 122 (1868).

¹⁹ *Realty Transfer Co. v. Kimball*, 68 Misc. 185 (N. Y. 1910).

²⁰ *Farmers' L. & T. Co. v. Wilson*, 139 N. Y. 284 (1893); but see *Kelly v. Bowerman*, 113 Mich. 446.

that this authority included the right to entitle the proceedings and to issue the precept in the agent's name.²¹ The proceedings may be entitled and the precept issued in the name of the agent where he is stated in the petition to be the agent of the owners in fee of the premises.²²

§ 78. Insurance Brokers.

Many brokers designate themselves "real estate and insurance brokers." As such, they usually solicit and receive applications for insurance. These applications they transmit to some insurance company selected by themselves or by the applicant for insurance. Such brokers are in law regarded as the agents for the applicants and not as agents of the company.²³

There are, of course, brokers who write insurance policies,—that is, are authorized by the company to accept risks and write and issue the policies. They are usually regarded as the company's agents, but sometimes even they may be regarded as partly the company's agents and partly the agents of the insured. Some policies contain special provisions as to who are to be regarded as the company's agents and by whose acts and representations the company is to be bound.

A broker who effects insurance under no employment by the insurance company, but for a commission paid by the company upon the premiums received for such risks as he procures and the company chooses to accept, is not an agent of the company. And notice to such an agent is not notice to the company.²⁴ And so an insurance broker soliciting business, whose sole office is to deliver the policy and collect the premium, is not an agent of the company and has no authority to bind the company. If

²¹ *Powers v. De O.*, 64 App. Div. 373 (N. Y. 1901).

²² *Case v. Porterfield*, 54 App. Div. 109 (N. Y. 1900).

²³ *Hartford Ins. Co. v. Reynolds*, 36 Mich. 502 (1877).

²⁴ *Devens v. Mechanics & T. Ins. Co.*, 83 N. Y. 168 (1880).

he is merely a conduit between the company and the insured for the delivery of the policy and its renewals and the collection of the premiums, to that extent, it may be said, he is the agent of the company, but no other powers can be predicated upon those acts.²⁵

In some states licenses are required to carry on the business of insurance broker.

²⁵ *Allen v. German Am. Ins. Co.*, 123 N. Y. 6 (1890).

CHAPTER VIII.

REVOCATION OF BROKER'S AUTHORITY.

§ 79. General Statement.

The relation of principal and agent, so far as real estate brokers are concerned, may be terminated in any of the following ways: (1) By mutual consent; (2) by performance of the object of the employment; (3) by the pleasure of either party in good faith; (4) by lapse of time; (5) by a sale of the property through means other than the broker's efforts; (6) by the destruction of the subject-matter; (7) by bankruptcy; (8) by the insanity of either party; (9) by the death of either party. (§§ 80-92.) The fraud of the agent also affects his agency. (§ 93.)

The agency continues as to third persons until notice of the revocation. (§ 94.) But death revokes the agency as to third persons, without notice. (§ 92.)

§ 80. Termination of Agency by Mutual Consent.

It needs no citation of authority to demonstrate that the principal and the broker may put an end to their relation by mutual consent. For whatever the parties may do by agreement, they may usually undo by agreement. It is true that there may be occasions in which a dispute may arise as to whether the agency has been terminated by mutual consent. But these occasions are dependent rather on questions of fact than on law.

§ 81. Termination by Performance of Object of Employment.

Again, no elaboration is required to show that the agency is terminated by performance of the object of em-

ployment. For, if the agent is employed to find a purchaser and finds one, or if he is engaged to purchase property and he purchases, the contract of employment is performed. "The agency of a real estate agent and his duty to his principal cease upon the delivery of the title papers and payment for the property."¹ But does not the broker's duty as such cease when he has obtained a purchaser, ready, willing and able to buy on the vendor's terms, or has brought about a contract of sale?²

§ 82. Termination of Agency at Pleasure of Principal.

As a general rule, a mere naked authority is, while executory, revocable at any time at the pleasure of the principal.³ A mere naked authority is one in the execution of which the agent has no other interest than that which springs from his employment as agent and his right to earn his compensation.⁴

Where no time is fixed, either the broker or the principal is at liberty to terminate the relation at will, acting in good faith.⁵ In *Raleigh R. E. & Trust Co. v. Adams*, 145 N. C. 164 (1907), the court said: "The defendants, having specified no definite time for the duration of the plaintiff's employment as their broker when they appointed and authorized it to sell the lots, had the right to terminate it at will, before any contract was effected with a purchaser, subject, however, only to the ordinary requirement of good faith."⁶

"Where the owner of property employs a broker to bring him an offer for the purchase of it, without naming

¹ *Board of Trustees v. Blair*, 45 W. Va. 820 (1899).

² See *Dickinson v. Updike*, 49 Atl. 713 (N. J. 1901). And see §§ 117-119 *infra*.

³ *Terwilliger v. Ontario Co.*, 149 N. Y. 92 (1896); and see *Miller v. Wehrman*, 115 N. W. 1078 (Nebr. 1908); *Glover v. Henderson*, 120 Mo. 376 (1893).

⁴ *Terwilliger v. Ontario Co.*, *supra*; *Glover v. Henderson*, *supra*.

⁵ *Geery v. Pollock*, 16 App. Div. 321 (N. Y. 1897).

⁶ Citing *Abbott v. Hunt*, 129 N. C. 403; *Sibbald v. Iron Co.*, 83 N. Y. 378; *Coffin v. Landis*, 46 Pa. St. 426; *Young v. Trainor*, 158 Ill. 428; *Bailey v. Smith*, 103 Ala. 641; *Hartley's Appeal*, 53 Pa. St. 212; *Hunt v. Rousmanier*, 8 Wheat. 174; *Ins. Co. v. Williams*, 91 N. C. 69; *Brookshire v. Vancannan*, 28 N. C. 186; *Wilcox v. Ewing*, 141 U. S. 627.

a price at which he is willing to sell,—that is to say, where the owner of property employs a broker to bring him an offer which he is to pass upon after it is brought to him,—there can be no implied agreement or understanding that the broker is to be entitled to a reasonable time in which to procure such an offer; in such a case the owner has a right to reject every offer brought to him, as was held in *Walker v. Tirrell*, 101 Mass. 257; and it is plain that under those circumstances he could decide not to accept any offer and to dismiss the broker altogether.”⁷

§ 83. Termination by Principal after Lapse of Reasonable Time.

Where no time is fixed within which the broker must procure a purchaser, the principal may, after the lapse of a reasonable time,⁸ terminate the broker's authority and relieve himself from liability, unless such action is taken in bad faith for the purpose of depriving the broker of the fruits of his labor at the time such labor was about to prove effectual.⁹ But if the broker fails after a reasonable time to procure a purchaser and the agency is terminated in good faith, it matters not that what the broker has done proves of use and benefit to the principal.¹⁰ And where the property remains in the broker's hands for a long time unsold, the owner has a right to terminate the broker's employment.¹¹

In *Milne v. Kleb*, 44 N.J.Eq. 384 (1888), the court suggested that one year might be a fair limit to the agency where no time is fixed. We do not say it was so decided,

⁷ *Cadigan v. Crabtree*, 179 Mass. 480 (1901); s. c. on further appeal, 186 Mass. 7 (1904).

⁸ “Where no time is expressed, the law will affix the limit of a reasonable time; but it will not extend an express limit.” *Emery v. Atlanta Exch.*, 88 Ga. 326 (1891).

⁹ *Donovan v. Weed*, 182 N. Y. 43 (1905); *Turner v. Snyder*, 132 Mo. App. 322 (1908); *Moore v. Boehm*, 45 Misc. 622 (N. Y. 1904); *Rand v. Cronkrite*, 64 Ill. App. 224 (1896).

¹⁰ *Donovan v. Weed*, *supra*. See also § 101.

¹¹ *Van Siclen v. Herbst*, 30 App. Div. 265 (N. Y. 1898).

but the court endeavors to compare the situation with what is required by the statute of frauds,¹² and uses these words, which are suggestive if nothing more: "Moreover, where power to sell land is given by parol it is usually given to serve a temporary purpose with an expectation on the part of the donor that it will be speedily exercised, and it would, therefore, seem entirely reasonable that the rule prescribed by the statute of frauds concerning parol contracts not to be performed within a year from the time they are made, should, by analogy, be adopted as the rule limiting the duration of such powers. Especially should this be so where it appears that neither party to the power had, for more than a year after it was granted, done anything which would indicate to the other that he regarded it as still subsisting."

The most that this case can be authority for is that the reasonable time implied by law should not be longer than a year. No definite time, however, can be laid down as constituting a reasonable time for all cases. If that were so, there would be no need to call it a "reasonable time," as it could then be called a "definite time." What would be a reasonable time in one case would not be in another. In the matter of the sale of the ordinary dwelling-house for which there is more or less call, a few months might be said to be a reasonable time within which the broker should procure a customer. On the other hand, a reasonable time in which to sell a large office building, for which there would be but few purchasers, should certainly be longer than the time allowed for a sale of an ordinary dwelling. The subject could be further discussed, but we should in the end have to return to the statement that what is a reasonable time depends altogether on the particular situation at hand. Enough has been said to illustrate the idea.

¹² See §§ 24-26 *supra*.

§ 84. Limitations on Principal's Power to Terminate Agency at Pleasure.

Some of the authorities cited in the preceding sections hold that the broker's authority may be revoked at any time by the principal, acting in good faith, while others hold that the principal may do so after the lapse of a reasonable time. It may be conceded that some confusion exists. The cases may be summarized, however, and the following may be said to be a fair general deduction: Where no time is fixed, and the broker has done nothing, his authority may be terminated at any time. Where the broker has actually instituted some negotiation, the principal may only terminate the authority in good faith—that is, for some sufficient reason, or after the broker has had a reasonable time in which to make his efforts produce results. Where no time is fixed, and the property remains in the broker's hands for a long time and he then enters upon negotiations, the principal may assert that as the broker has done nothing during a reasonable time, his authority has expired “by lapse of time.”

It is, however, generally conceded that in the ordinary case until the broker has actually some deal under way, the principal may withdraw the property from him and thus terminate the agency.¹³ In such case the broker could have no other cause for complaint than that he was thus prevented from possibly making a sale, which is altogether too speculative. It may be that where the broker has incurred expense,¹⁴ such as advertising the property, he is entitled to a fair and reasonable opportunity to perform his obligation, subject to the owner's

¹³ See *Warren v. Holbrook*, 118 N. Y. 592 (1889), where it was said that at any time before there was a reasonable assurance that the contract would be obtained (in that case a contract to do roofing), the principal might have terminated the agency.

¹⁴ See *Vincent v. Woodland Oil Co.*, 165 Pa. St. 402 (1894), where it did not appear that services were to be on a contingency. See also action for expenses, etc., where agent's authority was revoked pending his efforts—*Jaekel v. Caldwell*, 156 Pa. St. 206 (1893). See also *McDonald v. Ortman*, 98 Mich. 40 (1893).

right to sell independently.¹⁵ But it may be doubted if any recovery could be had therefor, since it is now customary for brokers to advertise property at their own risk,—unless, perhaps, the broker could show that his advertisement brought a prospective purchaser, in which case he would no doubt have to bring himself under the general rule and show that the owner terminated the agency in bad faith.

If the agency is for a definite time it cannot be terminated without liability to the agent, unless for the agent's default or by virtue of some agreement to that effect.¹⁶ Where the broker was to have a definite time to sell the property and expended money in an effort to do so and the agency is revoked before the expiration of the time limit, the broker is entitled to compensation.¹⁷ If a time is fixed giving exclusive right to sell and the broker in good faith undertakes performance on his part, the principal cannot revoke the authority without compensating the broker.¹⁸ And it has been said that the principal could not himself sell during the time.¹⁹ But see the subject of exclusive agency on this point.²⁰

§ 85. Revocation of Agency by Principal Must Be in Good Faith.

A leading case²¹ speaks generally of the right to terminate the contract of agency, in these words: "Where no time for the continuance of the contract is fixed by its terms, either party is at liberty to terminate it at will, subject only to the ordinary requirements of good faith. Usually the broker is entitled to a fair and reasonable opportunity to perform his obligation, subject, of course,

¹⁵ See *Glover v. Henderson*, 120 Mo. 367 (1893).

¹⁶ *Rand v. Cronkite*, 64 Ill. App. 224 (1896).

¹⁷ *Glover v. Henderson*, 120 Mo. 377, 380 (1893).

¹⁸ *Attix v. Pelan*, 5 Iowa 343 (1857).

¹⁹ *Id.*

²⁰ §§ 238, 239 *infra*.

²¹ *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 384 (1880).

to the right of the seller to sell independently. But that having been granted him, the right of the principal to terminate his authority is absolute and unrestricted, except only that he may not do it in bad faith, and as a mere device to escape the payment of the broker's commissions. Thus, if in the midst of negotiations instituted by the broker, and which were plainly and evidently approaching success, the seller should revoke the authority of the broker with the view of concluding the bargain without his aid and avoiding the payment of commissions about to be earned, it might well be said that the due performance of his obligation by the broker was purposely prevented by the principal. But if the latter acts in good faith, not seeking to escape the payment of commissions, but moved fairly by a view of his own interest, he has the absolute right before a bargain is made, while negotiations remain unsuccessful, before commissions are earned, to revoke the broker's authority, and the latter cannot thereafter claim compensation for a sale made by the principal, even though it be to a customer with whom the broker unsuccessfully negotiated, and even though, to some extent, the seller might justly be said to have availed himself of the fruits of the broker's labor."²²

Again, in the same case,²³ the court says: "If after the broker has been allowed a reasonable time within which to produce a buyer and effect a sale he has failed to do so, and the seller in good faith and fairly has terminated the agency and sought other assistance by the aid of which a sale is consummated, it does not give the original broker a right to commissions because the purchaser is one whom he introduced and the final sale is in some degree aided or helped forward by his previous unsuccessful efforts."

²² See also *Cadigan v. Crabtree*, 186 Mass. 13 (1904); *Newton v. Conness*, 106 S. W. 894 (Tex. 1908).

²³ *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 390, 391 (1880).

§ 86. Revocation Must Be Timely.

The termination of the agency must be timely. Where the broker has in fact procured a purchaser on his principal's terms, it is too late to revoke the broker's authority.²⁴ Likewise, where a written authorization provided that it should remain in force until nullified by the principal in writing, a nullification after the broker has performed his obligation is too late.²⁵ An express termination of the employment of the broker is matter of defense.²⁶ In other words, the broker need not show as part of his affirmative case that the agency was still in force, but the principal must show the contrary, if he relies upon a revocation of the agency.

§ 87. Termination of Agency by Previous Sale.

A previous sale revokes the agent's authority,²⁷ and no notice to the broker of the sale is necessary.²⁸ A broker must produce his customer while the premises are in the market; the owner does not contract to hold them for the customer to be produced by the broker, but, acting in good faith, he may sell the premises at any time and to any customer who is willing to buy upon his terms, and commissions cannot be collected for customers produced after the premises have been sold.²⁹

And a real estate broker is not entitled to commissions if his principal has already *in good faith* sold the property to the same customer through another broker.³⁰

But the giving of an option to another person is not a previous sale.³¹

²⁴ *Peach R. Co. v. Montgomery*, 115 S. W. 87 (Tex. 1908).

²⁵ *Finck v. Schmitt*, 48 Misc. 503 (N. Y. 1905). See also preceding sections.

²⁶ *Moore v. Boehm*, 45 Misc. 622 (N. Y. 1904).

²⁷ *Gerding v. Haskin*, 141 N. Y. 520 (1894); *Weisels v. Wainwright*, 127 Mo. App. 514 (1907); *Wallace v. Figone*, 107 Mo. App. 366, 367 (1904). (citing *Abern v. Baker*, 34 Minn. 98; *Walker v. Denison*, 86 Ill. 142; *Bissell v. Terry*, 69 Ill. 194; *Dolan v. Scanlon*, 57 Cal. 261; *Tiffany on Agency*, pp. 134, 135; *Mechem on Agency*, § 969; *Parsons on Contracts*, 71; *Reinhard on Agency*, § 160).

²⁸ *Wallace v. Figone*, *supra*.

²⁹ *Fittinghoff v. Horowitz*, 115 App. Div. 571 (N. Y. 1906).

³⁰ *Hodge v. Appelles*, 122 App. Div. 437 (N. Y. 1907).

³¹ *Wallace v. Figone*, *supra*.

§ 88. Good Faith Necessary to Termination of Agency by Previous Sale.

On an issue as to the good faith of the owner in terminating the plaintiff's employment and selling the property through other brokers to the same person, the owner may show that he paid a commission to the broker through whom the sale was finally effected, and this is relevant, as it tends to show that the owner did not terminate plaintiff's agency for the purpose of avoiding payment of commissions.³²

Where the broker produces a customer ready, willing and able to buy and apparently acceptable to the vendor, he has, under the general rule,³³ earned his commission, although after a delay was had for proper reasons the vendor informs the broker that the property is sold.³⁴

§ 89. Termination by Destruction of Subject-Matter.

"If the subject-matter of the agency is extinguished or ceases to exist, this will revoke the agency. It has been held, for instance, that where two persons jointly appoint an agent to take charge of some matter in which they are jointly interested, as to sell real estate owned by them jointly, a severance of the joint interest revokes the agency."³⁵

§ 90. Termination by Bankruptcy.

Bankruptcy, either of principal or broker, operates as a revocation of the agent's authority.³⁶ As a practical proposition it may be suggested that if the broker went into bankruptcy before bringing about a sale nothing would be due him and no question would arise. If he went into bankruptcy after effecting a sale and be-

³² Sewell v. Collison, 123 App. Div. 586 (N. Y. 1908).

³³ See §§ 117-119 *infra*.

³⁴ Parvin v. Abels-Gold Realty Co., 126 App. Div. 329 (N. Y. 1908).

³⁵ Clark on Contracts, 750, (citing Rowe v. Rand, 111 Ind. 206; 12 N. E. Rep. 377).

³⁶ Davis v. Lane, 10 N. H. 158. See also Clark on Contracts, 750.

fore collecting his commissions, the trustee in bankruptcy would succeed to the money. If the principal goes into bankruptcy before the broker completes a sale, the agency is no doubt terminated, for bankruptcy in effect brings about the destruction of the subject-matter, the bankrupt's title passing to the trustee in bankruptcy. If the principal becomes a bankrupt after the consummation of the sale and before payment of commissions, the broker stands as does any other creditor.³⁷

§ 91. Termination by Insanity.

We are not now dealing with the legal status of a contract made by a person of unsound mind. We are assuming that two competent persons have entered into an agency and that thereafter one becomes mentally incompetent. "It is said by Chancellor Kent that the authority of an agent may be revoked by the lunacy of a principal, but the better opinion would seem to be that the fact of the existence of the lunacy must have been previously established by inquisition before it could control the operation of the power."³⁸

In the case from which the foregoing is taken,³⁹ the court discusses the subject further, stating that the question was presented to the highest court of New Hampshire in the case of *Davis v. Lane*, 10 N. H. 156, and quoting from that case as follows:

"We are of opinion, however, that the authority of the agent, where the agency is revocable, must cease or be suspended by an act of Providence depriving the constituent of all mind and ability to act for himself, and that this doctrine can be sustained by very satisfactory principles. An authority to do an act for and in the name of another presupposed a power in the individual

³⁷ See *Collier on Bankruptcy* (7th Ed.), 740.

³⁸ *Merritt v. Merritt*, 27 App. Div. 208 (N. Y. 1898).

³⁹ *Merritt v. Merritt*, 27 App. Div. 208 (N. Y. 1898).

to do the act for himself, if present. The act to be done is not the act of the agent, but the act of the principal; and the agent can do no act in the name of the principal which the principal might not himself do if he were personally present. The principal is present by his representative, and the making or execution of the contract or acknowledgment of a deed is his act or acknowledgment. But it would be preposterous, where the power is in its nature revocable, to hold that the principal was, in contemplation of law, present, making a contract or acknowledging a deed, when he was in fact lying insensible upon his death-bed, and this fact well known to those who undertook to act with and for him. The act done by the agent, under a revocable power, implies the existence of volition on the part of the principal. He makes the contract. He does the act. It is done through the more active instrumentality of another, but the latter represents his person and uses his name. Further: Upon the constitution of an agent or attorney to act for another, where the authority is not coupled with an interest, and not irrevocable, there exists at all times a right of supervision in the principal, and power to terminate the authority of the agent at the pleasure of the principal. The law secures to the principal the right of judging how long he will be represented by the agent and suffer him to act in his name. So long as, having the power, he does not exercise the will to revoke, the authority continues. When, then, an act of Providence deprives the principal of the power to exercise any judgment or will on the subject, the authority of the agent to act should thereby be suspended for the time being; otherwise, the right of the agent would be continued beyond the period when all evidence that the principal chose to continue the authority had ceased, for, after the principal was deprived of the power to exercise any will upon the subject, there could be no assent or acquies-

cence, or evidence of any kind to show that he consented that the agency should continue to exist. And, moreover, a confirmed insanity would render wholly irrevocable an authority which, by the original nature of its constitution, it was to be in the power of the principal at any time to revoke. It is for these reasons that we are of opinion that the insanity of the principal, or his incapacity to exercise any volition upon the subject by reason of an entire loss of mental power, operates as a revocation, or suspension for the time being, of the authority of an agent acting under a revocable power."

The rule thus laid down is adopted by Judge Story.⁴⁰

§ 92. Termination by Death.

Agency is terminated by the death of the principal.⁴¹ And the death of the agent, of course, terminates his agency. No notice of the death of the principal is necessary to relieve his estate of responsibility.⁴²

"The question is not new, and it has been uniformly answered by our decisions to the effect that the death of the principal puts an end to the agency, and, therefore, is an instantaneous and unqualified revocation of the authority of the agent. 2 Kent's Com. 646; *Hunt v. Rousmanier*, 8 Wheat. 174. There can be no agent where there is no principal. There are, no doubt, exceptions to the rule, as where the agency is coupled with an interest (*Knapp v. Alvord*, 10 Paige, 205; 40 Am. Dec. 241; *Hunt v. Rousmanier*, *supra*; *Hess v. Rau*, 95 N. Y. 359), or where the principal was a firm and only one of its members died. *Bank v. Vanderhorst*, 32 N. Y. 553. But both cases recognize the general rule to be as above stated. In *Davis v. Windsor Savings Bank*, 46 Vt. 728,

⁴⁰ Story on Agency, § 481. See also *Matthiesen & W. Refining Co. v. MacMahon*, 38 N. J. Law 536. (The *Merritt* case is again reported on a subsequent trial, in 32 Misc. (N. Y.) 21; *aff'd*, without opinion, 62 App. Div. (N. Y.) 617.)

⁴¹ *Farmers' L. & T. Co. v. Wilson*, 139 N. Y. 284 (1893).

⁴² *George on Partnership*, 258, and cases there cited; *Weber v. Bridgman*, 113 N. Y. 600 (1889).

the rule was applied. The defendant paid money to the agent after the death of his principal, but in ignorance of it, and the administrator of the deceased recovered.

“It is quite unnecessary to go through the cases on this subject. The rule at common law which determines the authority of an agent by the death of his principal is well settled, and no notice is necessary to relieve the estate of the principal of responsibility, even on contracts into which the agent had entered with third persons who were ignorant of his death. Those who deal with an agent are held to assume the risk that his authority may be terminated by death without notice to them. This rule was established in England (Leake Cont. 487), although now modified by statute, and is generally applied in this country.⁴³ In some States alterations have been made by statute; and, following the civil law, it was held in Pennsylvania,⁴⁴ that the acts of an agent or attorney, done after the death of his principal, of which he was ignorant, are binding upon the parties. This was, however, in opposition to the current of authority. 1 Bars. Cont., 71; 2 Kent's Com. 646.”⁴⁵

§ 93. Fraud of Agent as Revocation.

As will be seen,⁴⁶ one of the requisites entitling a broker to commission is “good faith.” Where the broker commits a fraud on his principal he has, of course, failed to observe good faith and cannot claim his commission. “When an agent abandons the object of his agency and acts for himself by committing a fraud for his own exclusive benefit, he ceases to act within the scope of his employment and to that extent ceases to act as agent.”⁴⁷

⁴³ Citing Story on Agency, § 488; Pars. Cont., Vol. 1, p. 71; 2 Kent's Com. (12th Ed.), 645, 646.

⁴⁴ *Cassiday v. McKenzle*, 4 Watts & Serg. 282; 30 Am. Dec. 76.

⁴⁵ *Weber v. Bridgman*, 113 N. Y. 600 (1889).

⁴⁶ § 60 *supra et seq.* and Ch. XIII *infra*.

⁴⁷ *Henry v. Allen*, 151 N. Y. 1 (1896); 36 L. R. A. 658, (citing *Shipman v. Bank*

§ 94. Revocation as to Third Parties.

When one has constituted or accredited another his agent, the authority of the agent continues, even after an actual revocation, until notice of the revocation has been given.⁴⁸ Notice of revocation of the agency is governed by the same rules as notice of the dissolution of a partnership.⁴⁹

of New York, 126 N. Y. 318; 12 L. R. A. 791; *Welsh v. G. A. Bank*, 73 N. Y. 424, 29 Am. Rep. 175; *Allen v. So. Boston R. Co.*, 150 Mass. 200; 5 L. R. A. 716). See also *Benedict v. Arnoux*, 154 N. Y. 715 (1897); *Bienenstock v. Ammidown*, 155 N. Y. 47 (1898). See also §§ 50-71 *supra*.

⁴⁸ *Clafin v. Lenheim*, 66 N. Y. 305 (1876); *Bielenberg v. Montana U. R. Co.*, 2 L. R. A. 813 (1888).

⁴⁹ *Clafin v. Lenheim*, *supra*. But see § 92 *supra*.

PART II.—COMMISSIONS AND THEIR RECOVERY.

CHAPTER IX.

GENERAL RULES AS TO COMMISSIONS.

§ 95. General Statement.

A broker's commissions are earned when, having been employed, he has been the procuring cause of the sale. (§ 96.)

When several brokers are employed on the same property, the broker who in good faith and without collusion consummates the sale is entitled to the commission. (§§ 97, 98.)

An exclusive agent is entitled to his commission when he produces a party ready to purchase at a satisfactory price. (§ 99.)

The owner may always, in good faith, sell independent of the broker unless he has agreed not to do so. (§ 100.)

If a broker abandons his negotiations, the employer may subsequently sell to the same person without liability to the broker for commissions. (§ 101.)

Under the rule which prevails in most jurisdictions, to recover commissions, the duly employed broker must show that he either procured a contract of sale, or that he produced an available purchaser who was ready, willing and able to purchase on his employer's terms. (§ 102.)

§ 96. When Commissions are Earned.

As stated more fully hereafter,¹ the rule which prevails in most jurisdictions is that a duly employed broker is the "procuring cause" and entitled to commissions either when he secures a contract of sale or produces a purchaser ready, willing and able to purchase on his principal's terms.

A typical case is that of *Kiernan v. Bloom*, 91 App. Div. 429 (N. Y. 1904).² Here it was agreed that the broker should advertise the owner's place in the broker's name; that the inquiries should be attended to by the broker and that the owner would pay a commission if a sale resulted. A purchaser had his attention drawn to the advertisement and wrote the broker asking for details. The broker arranged a meeting between his representative and the purchaser, and within a day or two after this interview, in which the broker's representative described the property and advised the purchaser to buy, the purchaser opened negotiations personally with the owner, which resulted in his purchasing the property. The matter of the purchase and the sale had not been discussed before between the owner and the purchaser and no other agency at any time intervened to induce the purchaser to open negotiations. The purchaser did not disclose to the broker or his representative that he had previously seen the property nor did he mention the broker or his representative to the owner. The broker did not introduce the purchaser to the owner, and he was not present when the sale was consummated.

In passing upon this case the court said: "The sale was effected through the plaintiff's (broker's) agency as the procuring cause; his communications with the purchaser were the cause and means of bringing him and the defendant (owner) together, and a sale resulted in con-

¹ See § 117 *infra*.

² See also *Branch v. Moore*, 105 S. W. 1178 (Ark. 1907).

sequence of his efforts. He is, therefore, entitled to his commissions. It is of no consequence that the plaintiff did not negotiate the sale in person, and was not present at the sale; nor that the purchaser was not made known to the defendant as the plaintiff's customer, for he was so in fact. The plaintiff's right to commissions is in no way affected by proof that the defendant himself negotiated the sale, nor by the fact that the purchaser was not introduced to the owner by the plaintiff. In full compliance with his agreement he procured a purchaser, who took the property on the owner's terms. His commissions were, therefore, earned."

It is not essential, to entitle a broker to commissions, that he should have procured a purchaser upon the precise terms first named by the principal at the time of employment; for if, through the instrumentality of the broker, the buyer and seller meet, and negotiations are thus opened up between them, which, continuing without withdrawal of either party therefrom, culminate in a sale, though for a less sum than originally named, the broker is entitled to his commissions.³

And in *Southwick v. Swavienski*, 114 App. Div. 681 (N. Y. 1906), it was held that where a broker duly employed, is the cause of bringing the purchaser and owner together, he is entitled to his commissions although the sale is consummated subsequently by the owner himself on different terms.⁴

§ 97. Respective Rights of Brokers when Several are Employed.

The owner may employ as many brokers as he pleases,⁵ and he is liable for commissions only to the one who effects the sale.

³ *Hobbs v. Edgar*, 23 Misc. 618 (N. Y. 1898).

⁴ See also *Branch v. Moore*, 105 S. W. 1178 (Ark. 1907).

⁵ See § 237 *infra*.

Where there are two brokers, the one who first calls the customer's attention to the property is not necessarily entitled to the commissions. If the other broker in good faith and without collusion consummates the sale, he is entitled to the commission.⁶ "Unless he specially agrees not to do so, an owner may employ two or more brokers. In such case it is the broker who is the efficient cause of the sale who is entitled to commissions, and this right is not affected by the fact that such broker sells to one whose attention to the property had before been called by another broker. It is not the broker who first speaks of the property, but he who is the procuring cause of the sale, be he the first or second to engage the attention of the purchaser.⁷ The party selling, where several brokers have been employed, may in the absence of all collusion on his part, pay to the agent through whose instrumentality the sale was brought about, without inquiry as to whether some other broker may not have had something to do with effecting the sale."⁸

"Whatever may be the rights of a real estate broker who takes a customer away from another broker and closes a sale between such customer and the owner, if done without the aid or connivance of the owner, yet if the owner, with knowledge of the facts, deals with the customer of the first broker, even through another agent, he will be liable to the first broker."⁹ Where two brokers are apparently working on the same purchaser, the one who first brings the purchaser up to the terms of the employer is entitled to the commissions.¹⁰

In *Jennings v. Trummer*, 96 Pac. 874, (Ore. 1908), the court quotes from *Tinsley v. Scott*, 69 Ill. App. 352,

⁶ *Martin v. Billings*, 2 N. Y. City Ct. Rep. 86 (1884); *McCloskey v. Thompson*, 26 Misc. 735 (N. Y. 1899).

⁷ *Citing Mechem on Agency*, § 969; *Vreeland v. Vetterlein*, 33 N. J. L. 247; *Sibbald v. The Bethlehem Iron Co.*, 83 N. Y. 378.

⁸ *Patten v. Willis*, 134 Ill. App. 651, 652 (1907), quoting from *McGuire v. Carlson*, 61 Ill. App. 295. See §§ 338-346 *infra*.

⁹ *Jennings v. Trummer*, 96 Pac. 874 (Ore. 1908).

¹⁰ *Freedman v. Havenmeyer*, 37 App. Div. 518 (N. Y. 1899); *Hennings v. Parsons*, 108 Va. 3 (1908).

355: "Of several independent brokers under such employment at the same time, the one who first so sells is entitled to the commission. No express contract to that effect is required to give him that right. But, to be a producer, the party presented must be a client or a customer of his own, and not one then sustaining that relation to another broker under like employment. If he was first in negotiation with such other, he continues to sustain that relation to him until it is expressly broken off, or the matter of the purchase has ceased to be held by him under consideration. The employer, with notice of the pendency of such negotiation, cannot escape liability to the broker for his commission by selling to his customer through another, even though he first discharges the former if he does so without giving him a reasonable time to effect the sale."¹¹ "Where two brokers are employed, the one effects the sale who brings the minds of the parties to meet."¹²

§ 98. Rule as to Commissions when Several Brokers are Employed.

The fact that a person is the first broker who calls the attention of the purchaser to the property, in itself, gives no claim to commissions. The right to commissions depends upon the performance of the broker's obligation to bring the buyer and seller to an agreement.¹³

Where the owner does not know that the purchaser produced by the second broker is the same purchaser which the first broker is working with, the owner is not liable to the first broker in the absence of bad faith, or of such facts as should have prompted inquiry.¹⁴ Although the parties are originally brought together by the broker, but no terms are agreed upon, and some

¹¹ Also citing *Day v. Porter*, 60 Ill. App. 386, 389.

¹² *Hobbs v. Edgar*, 23 Misc. 618 (N. Y. 1898).

¹³ *Haines v. Barney*, 33 Misc. 748 (N. Y. 1900).

¹⁴ *Quist v. Goodfellow*, 99 Minn. 511 (1906).

weeks later the matter is taken up by another broker who finally consummates the sale by bringing the parties to terms, the first broker is not entitled to commissions. To earn his commission the broker must do something more than get authority from the owner to negotiate the sale. He must be the effectual cause of the sale. He must find the purchaser, or at the very least induce a purchaser to buy the property at a price acceptable to the owner.¹⁵ "The fact that a sale or exchange of the property is finally brought about by the efforts of the principal or another broker with a person with whom the first broker had previously negotiated without success, will not furnish a legal basis for a claim for commissions by the first broker, especially when it appears that the first broker has for a long time ceased negotiations with the purchaser and abandoned all efforts to induce him to take the property on the proposed terms."¹⁶ While the statement of the law is plain, it is a matter not always free from difficulty to determine which broker's efforts were the *inducing* cause of the sale.¹⁷

In *Edwards v. Pike*, 107 S. W. 586 (Tex. 1908), it was said: "The general rule is that a real estate agent having a contract authorizing him to effect a sale is entitled to the commissions agreed upon where he procures a buyer who consummates the purchase of the property on terms satisfactory to the owner. Ordinarily the application of this rule to the facts of a given case is not difficult; for, when it is shown that the agent was instrumental in bringing the buyer and seller together, the fact that the agent was the procuring cause of the sale afterwards consummated is sufficiently established. But when each of two or more brokers within the knowledge of the other

¹⁵ *De Zavala v. Rogallner*, 45 Misc. 430 (N. Y. 1904).

¹⁶ *Davis v. Gassette*, 30 Ill. App. 45 (1888), (citing *Lipe v. Ludewick*, 14 Ill. App. 372; *Sibbald v. Bethlehem Iron Works*, 83 N. Y. 378).

¹⁷ See also § 173 *infra*.

has a contract authorizing him to effect a sale of the same property, the fact that one was instrumental in bringing the parties together fairly cannot be made the test of the liability of the owner of the property for commissions claimed. The owner has a right to authorize more than one broker, each independently of the other, to effect a sale of his property; and, so long as he remains neutral, he ought to be permitted without incurring liability for commissions to more than one of them to consummate the sale of the property through the one who first produces a person ready to buy it, whether the agent producing the purchaser is the one who first brought him and the buyer together or not. The practical test which ought to control in fixing the liability of the property owner on the facts of a case like this is: Within the knowledge of the owner at the time, was the sale consummated on terms agreed upon between the buyer and the broker who brought the parties together; or was it consummated on other terms as the result of negotiations between another broker and the buyer, and after the latter had abandoned the contract made by him with the other broker? In the absence of special circumstances which would make it proper to so charge him, the owner ought not to be held liable for commissions to more than one broker, and, after actually selling his property to a purchaser produced by one broker on terms negotiated by such broker and not by another, he ought not before paying him the commissions be required * * * at his peril to determine whether some other broker was not, in fact, the procuring cause of the sale.¹⁸ In such a case, the risk of finally effecting by his agency, on terms agreed upon between him and the buyer, a sale of the property, ought to be borne by the broker. His services towards effecting one are performed with a knowledge on his part that another broker has authority similar to

¹⁸ See Ch. XXXV, "Interpleader," § 339, as to conflicting claims for commission.

that conferred upon him; and, if before a sale is completed the buyer quits him and on other terms consummates it through another agent, it is a contingency he should be held to have contemplated at the time he undertook the service, and about the happening of which he has no right to complain.¹⁹ The broker who undertakes a sale of property with full knowledge that another broker has also undertaken to sell it ought not to expect more of the owner than that he will not interfere in favor of the one or the other. It is then an even contest between them, where the chances of success in contemplation of the competition to be expected should be presumed to have been duly weighed by each; and, if as a result of such competition, without interference or fault on the part of the owner, the sale is actually consummated by his competitor the broker who brought the prospective purchaser and the owner together, but failed to consummate a sale upon the terms agreed upon between him and the buyer, ought not to be permitted to charge against the owner the loss sustained by him, not by the owner's fault but as a result of acts of his competitor and conduct of the purchaser which he reasonably should have contemplated might ensue when he undertook and performed the service. Such a case is not at all like the one where the broker, having the exclusive right to sell, or ignorant of the fact that another broker has a right equal to his own, brings the purchaser and the owner together, when the sale is consummated by the owner himself or by the direct agency of another broker. There the broker bringing the parties together should be held to be entitled to his commissions if the sale is consummated by the owner himself, because he is entitled to same by the terms of his contract; and if the sale is consummated by another broker, because his services were performed on

¹⁹ Citing *Vreeland v. Vetterlein*, 33 N. J. L. 247; *Scott v. Lloyd*, 19 Colo. 401; 35 Pac. 733; *Farrar v. Brodt*, 35 Ill. App. 617; *McGuire v. Carlson*, 61 Ill. App. 295.

the faith of his contract and without reference to risks of failure which a knowledge that he had a competitor would have caused him to weigh and perhaps provide against."

§ 99. Liability of Principal for Commissions to Exclusive Agent.

A broker, employed to make a sale under an agreement for the exclusion of all other agencies, is entitled to his commissions when he produces a party ready to purchase at a satisfactory price,²⁰ and the principal cannot avoid liability for such commissions by negotiating a sale through another broker.²¹ And where a broker is given the exclusive agency to sell property, as for instance a large plot of lots, the owner is liable in damages if he breaks the agreement.²²

§ 100. Liability for Commissions when Principal Negotiates Sale.

"A party having employed a broker to sell real estate, may, notwithstanding, negotiate a sale himself; and if he does so without any agency of the broker, is not liable to him for commissions. To earn his commissions the broker must be an efficient agent in, or the procuring cause of the contract.²³ His commission is earned by finding a sufficient purchaser, ready and willing to enter into a valid contract for the purchase upon the terms fixed by the owner, and having introduced such a one to the owner as a purchaser, is not deprived of his

²⁰ See §§ 117-119 *infra* as to conflicting views concerning when broker is the procuring cause of a sale. As to exclusive agency, see § 239 *infra*.

²¹ *Moses v. Bierling*, 31 N. Y. 462 (1865).

²² *Barthrick v. Coffin*, 13 App. Div. 101 (N. Y. 1897); *Attix v. Pelan*, 5 Iowa 344 (1857).

²³ The owner may always in good faith sell independent of the broker unless he has agreed not to do so. *Burch v. Hester*, 109 S. W. 399 (Tex. 1908); *Cook v. Forst*, 116 Ala. 396 (1896); *Humphries v. Smith*, 5 Ga. App. 343 (1903). See also § 238 *infra*.

right to commission by the owner negotiating the contract himself." ²⁴

A contract employing a broker to sell lands and giving him commissions "in case of the sale or conveyance of said property at any time within one year from this date," should not be construed to mean that the broker was entitled to commissions if the property were sold by the owner without the aid of the broker, but, on the contrary, only entitles the broker to commissions if he was instrumental in bringing the owner and purchaser together. ²⁵

§ 101. Rule as to Commissions when Broker's Efforts Fail.

"In *Wylie v. Bank*, 61 N. Y. 416, it is held that, to entitle a broker to recover, he must be the efficient agent or the procuring cause of the sale. The means employed by him, and his efforts, must result in the sale. He must find the purchaser, and the sale must proceed from his efforts, acting as broker; and where a broker opens negotiations, but, failing to bring the customer to the specified terms, abandons them, and the employer subsequently sells to the same person at the price fixed, he is not liable to the broker for commissions. ²⁶ Although in *Hay v. Platt*, 66 Hun 488, 21 N. Y. Suppl. 362, the principal had subsequently dealt directly with the party brought to his notice by the broker, and sold at the same price he had been willing to sell for originally, the broker was not allowed to recover. This upon the ground that where the broker fails to produce a customer ready and willing to enter into a contract upon the terms of his

²⁴ *McClave v. Paine*, 49 N. Y. 561 (1872), (citing *Lyon v. Mitchell*, 36 N. Y. 235; *Barnard v. Monnot*, 3 Keyes (N. Y.) 203; *Moses v. Bierling*, 31 N. Y. 462; *Redfield v. Tegg*, 38 N. Y. 212).

²⁵ *Parkhurst v. Tryon*, 134 App. Div. 843 (N. Y. 1909).

²⁶ See §§ 241, 242 *infra*.

principal and abandons further efforts the principal violates no right of the broker in negotiating with the proposed purchaser directly and independently. In *Douglass v. Halstead*, 81 Hun 65, 30 N. Y. Suppl. 592, a broker had been negotiating a sale and was compelled to stop before reaching a consummation by the circumstance that the purchaser at the time wanted another piece of property in addition to the defendant's. Another broker conceived the idea of a partition suit to bring about a sale of the other piece required, and commission was finally paid him on the sale. The court (at page 69, 81 Hun, and page 594, 30 N. Y. Suppl.) said: 'While it is unfortunate for the plaintiff that he should have been "so near and yet so far" from the accomplishment of his purpose, the fact remains that the evidence justified the determination of the referee that the plaintiff did not at any time find a purchaser, and produce him to his principal, ready and willing to purchase the real estate upon its terms * * * and this much was necessary for him to do in order to recover.' ''²⁷

But "if the efforts of the broker are rendered a failure by the fault of the employer; if capriciously he changes his mind after the purchaser, ready and willing, and consenting to the prescribed terms, is produced; or if the latter declines to complete the contract because of some defect of title in the ownership of the seller, some unremoved incumbrance, some defect which is the fault of the latter, then the broker does not lose his commissions." ''²⁸

§ 102. On What Recovery of Commissions Depends.

In order to recover commissions, the broker must:
(1) Show that he was employed; (2) be the procuring

²⁷ *Markus v. Kenneally*, 19 Misc. 517; 43 N. Y. Suppl. 1057, 1058 (1897).

²⁸ *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 383, 384 (1880).

cause of the sale; (3) bring about the deal on the terms of his employer; (4) act in good faith; (5) produce an available purchaser, which under the general rule is one ready and willing to purchase and also legally able to do so; (6) bring about a completed transaction.

CHAPTER X.

BROKER MUST BE EMPLOYED.

§ 103. General Statement.

A mere volunteer who brings a customer is not entitled to commissions. (§§ 104, 105.) To justify a recovery of commissions, there must be an employment of the broker, either express or to be implied from the circumstances. (§§ 106, 107.) Where the broker claims he was employed by the owner's agent, he must show the agent's authority to employ him. (§ 108.) Where original employment is wanting, a ratification of the broker's acts may, under some circumstances, be equivalent to an original retainer. (§§ 109-112.)

§ 104. Volunteers Not Entitled to Commission.

In order to recover commissions, a broker must prove an employment by the defendant and the rendition of services at the defendant's request.¹ It occurs frequently that the broker is not retained by the owner of property to endeavor to sell it but hears through other sources that the owner desires to sell. The broker then interests himself in the matter and endeavors to find a purchaser, not having, however, been authorized or requested by the owner to do so. In such case, the broker is said to be a "volunteer." The owner may, in such case, recognize the efforts of the broker and obligate himself to pay commissions, or he may refuse to recognize the broker's efforts altogether.²

¹ *Roome v. Robinson*, 99 App. Div. 143 (N. Y. 1904).

² See §§ 109-112 *infra*.

“ If the broker renders services as a mere volunteer, without authority, express or implied, the owner of the property is not bound to pay him anything for such services.”³ “ If a broker, without a previous request, brings a customer to a vendor, and the latter, without further acceptance of the broker’s services, takes the customer, the broker is not entitled to compensation. An owner is not obliged to refuse a possible customer because services which he has not requested have been obtruded upon him, nor can he be enticed into a liability for commissions without his knowledge. In order to entitle the broker to commissions, there must be an actual employment or ratification and acceptance of the broker’s acts; but in such case the intention to ratify must be plain, and no ratification could be inferred where no claim was made by the broker, and the fact that he was acting as broker was not drawn to the attention of the seller at the time.”⁴

§ 105. When Party Acting Is a Volunteer.

Even though a person is a real estate broker, he may assume such relations to the parties as would entitle the latter to the benefit of any services rendered. For example, a broker may agree that the amount of his commission may be deducted from the purchase price and allowed to the purchaser, in whom he is interested.⁵ Or, again, a person is not entitled to a commission from the owner for informing a broker that certain property is

³ *Fordtran v. Stowers*, 113 S. W. 631 (Tex. 1908), (citing *Pipkin v. Horne*, 68 S. W. (Tex. Civ. App.) 1000; *Ehrenworth v. Putnam*, 55 S. W. (Tex. Civ. App.) 190; *Dunn v. Price*, 87 Tex. 319; 28 S. W. 681; *Cook v. Welch*, 91 Mass. 350; *Hinds v. Henry*, 36 N. J. L. 328; *McVickar v. Roche*, 74 App. Div. 397; 77 N. Y. Suppl. 501; *Viley v. Pettit*, 96 Ky. 576; 29 S. W. 438; *Walton v. Clark*, 54 Minn. 341; 56 N. W. 40; *Barton v. Powers*, 182 Mass. 467; 65 N. E. 826).

⁴ *Fowler v. Hoschke*, 53 App. Div. 327 (N. Y. 1900); *McVickar v. Roche*, 74 App. Div. 397 (N. Y. 1902); *Hinds v. Henry*, 36 N. J. L. 330 (1873); *Ballentine v. Mercer*, 130 Mo. App. 614 (1908), (citing *Butts v. Rubey*, 85 Mo. App. 405; *Brady v. Machine Co.*, 83 N. Y. Suppl. 663; *Haynes v. Fraser*, 78 N. Y. Suppl. 794; *Downing v. Buck*, 98 N. W. 388; *Barton v. Powers*, 65 N. E. 826; *Viley v. Pettit*, 29 S. W. 438).

⁵ *Redhead v. Parkway Club*, 148 N. Y. 471 (1895).

in the market, a purchaser for which is afterward procured by the broker.⁶

Likewise, one not engaged in the real estate business, who learned from the husband of a landowner that his wife wished to sell and was told by the husband to get a customer, is not entitled to a commission because a relative on his advice bought the property, when it does not appear that the husband had any authority to employ the plaintiff or the owner had any knowledge of such employment, or ratified it, or that the husband knew that the plaintiff intended to make any charge for his services.⁷

§ 106. Employment Necessary to Recovery of Commissions.

“To justify a recovery there must be an employment of the broker either express or implied from the circumstances surrounding the transaction.”⁸ “If the broker introduces one party to the other and a sale results, unless he is able to show employment, that fact does not entitle him to compensation.”⁹

“To entitle a broker to recover commissions for effecting a sale of real estate, it is indispensable that he should show that he was employed by the owner (or on his behalf) to make the sale. A ratification of his act, where original employment is wanting, may, in some circumstances, be equivalent to an original retainer, but only where there is a plain intent to ratify. An owner cannot be enticed into a liability for commissions against his will. A mere volunteer without authority is not entitled to commissions merely because he has inquired the price which an owner asks for his property and has

⁶ *Holley v. Townsend*, 2 Hill. 34 (N. Y. 1858).

⁷ *Hurl v. Lee*, 132 App. Div. 110 (N. Y. 1909).

⁸ *Benedict v. Pell*, 70 App. Div. 43 (N. Y. 1902); *Fordtran v. Stowers*, 113 S. W. 631 (Tex. 1908); *Sanchez v. Yorba*, 97 Pac. 205 (Cal. 1908), (citing *Toomy v. Dunphy*, 86 Cal. 640; 25 Pac. 13).

⁹ *Bright v. Canadian Int. Stock Yard Co.*, 83 Hun 482 (N. Y. 1895).

then sent a person to him who consents to take it. A broker has no better claim to recover for voluntary services rendered without employment and not received and acted upon by the owner as rendered in his behalf than any other volunteer. * * * It is not true that an owner may not declare his price to whom he will without the hazard of paying commissions to those who volunteer, unasked, to send him a purchaser on his own terms."¹⁰

§ 107. Manner of Employment.

The employment of the broker is usually brought about by the principal listing the property for sale with the broker. That, of course, amounts to an employment.¹¹ And, as we shall see presently, the broker may be employed by a third person in behalf of the principal, or a person may place himself in such relation with the broker that an employment will be implied, or, still further, the broker may proceed to act without being expressly employed, and what he does is accepted or ratified by the principal in such manner as to impose a liability upon the principal for commissions.¹² Then, too, efforts have sometimes been made to draw distinctions concerning the nature of the broker's employment,—a subject discussed later in the present volume.¹³

§ 108. Employment Must Be by Owner or Authorized Agent.

To entitle a recovery for broker's commissions, an employment must be shown by the person to be charged, or by his duly authorized agent. A wife has no implied

¹⁰ *Benedict v. Pell*, 70 App. Div. 45 (N. Y. 1902), quoting from *Pierce v. Thomas*, 4 E. D. Smith 354 (N. Y. 1855).

When the fact of employment is disputed, the question should be left to the jury. *De Mars v. Boehm*, 6 Misc. 38 (N. Y. 1893).

¹¹ *Ebert v. Wilcox*, 155 Mich. 70 (1908). See Forms 36-38 *infra*.

¹² See §§ 109-112 *infra*.

¹³ See § 115 *infra*.

authority to bind her husband in the disposition of his real estate. Her authority must be shown.¹⁴ Where the broker is employed by a third person, the execution of the contract of sale by the owner, with full knowledge of the facts, operates as a ratification of the acts of the broker.¹⁵ And so, where the owner's son made the arrangements for commission, and all the ensuing negotiations were had with the son, and after the transaction was concluded the broker was referred by the owner to the son for the payment of commission, the son's authority to employ the broker and promise commission is inferentially apparent.¹⁶

§ 109. Ratification Equivalent to Original Employment.

Another way in which the relation of broker and principal may be created is by ratification. If the broker enters upon negotiations without authority from the owner the latter, on learning of it, may confirm or adopt the acts. Such a ratification relates back, and is equivalent to prior authority. As we shall look at the question of ratification only from the standpoint of the broker's right to commissions in case his acts are ratified, we shall not need to enlarge on the rights of third persons to hold the principal upon a ratification.

As stated in Clark on Contracts, 719, the general rules applicable to ratification require that the agent must have contracted as agent and not on his own account; that the principal must have been in contemplation, or at least ascertainable at the time; that the principal must have been in existence; that the contract must be lawful and must have been such as the principal had legal capacity to make, and that the ratification must be with a full

¹⁴ Harrell v. Veith, 13 N. Y. St. Rep. 738 (1888).

¹⁵ Charles v. Cook, 88 App. Div. 82 (N. Y. 1903); Watkins Co. v. Thetford, 96 S. W. 73, 74 (1906); Mercantile Trust Co. v. Niggeman, 119 Mo. App. 56 (1906).

¹⁶ Pollatschek v. Goodwin, 17 Misc. 591 (N. Y. 1896).

knowledge, actual or constructive, of all the material facts.

§ 110. Intent to Ratify Must Be Plain.

As we have seen,¹⁷ to entitle a broker to recover commissions for effecting a sale it is indispensable that he should show that he was employed to make the sale. A ratification of his act, where original employment is wanting, may, in some circumstances, be equivalent to an original retainer, but only where there is a plain intent to ratify.¹⁸ An owner cannot be enticed into a liability for commissions against his will.¹⁹ Ratification, however, implies a knowledge of the circumstances, and also of the right to reject or ratify.²⁰

Where there was no employment and the owners sold the property to a person with whom the broker was negotiating almost two years before, and who at that time had made an offer through the broker, there is no ratification of an employment of the broker alleged to have been made by the owners' agent, especially where the owners knew nothing about any claim of the broker.²¹

It may be seen that confusion may easily arise in the consideration of this matter. One of the essentials requisite for the recovery of broker's commissions is employment. A mere volunteer who brings a customer to a vendor, whom the latter, *without further acceptance of the broker's services*, takes, is not entitled to compensation,²² while, on the other hand, where original employment is wanting, a ratification of the broker's acts may become equivalent to an original retainer, *where there is a plain intent to ratify*.²³ It is therefore this which dis-

¹⁷ §§ 104-107 *supra*.

¹⁸ See *Wilson v. Dame*, 58 N. H. 302 (1878); *Downing v. Buck*, 135 Mich. 639 (1904).

¹⁹ *Benedict v. Pell*, 70 App. Div. 45 (N. Y. 1902).

²⁰ *King v. Mackellar*, 109 N. Y. 223 (1888).

²¹ *Cohn v. Lee*, 132 App. Div. 697 (N. Y. 1909).

²² §§ 104-107 *supra*.

²³ §§ 104, 106, 109 *supra*; § 112 *infra*.

tinguishes the two situations,—in the one case, the vendor takes the purchaser but refuses to recognize the broker because not engaged to make the sale, while in the other case the vendor takes the purchaser produced by the broker, though not engaged to find one, and manifests in some way his intention to ratify what the broker did. It may be seen how differences of opinion may easily arise, not only in the minds of juries, but with judges and lawyers as well, as to whether the vendor treated the broker as a “volunteer” or ratified his acts.

§ 111. Ratification by Implication.

Where a party knows that the services were being offered by a broker who expected pay, the acceptance of the services by the principal implies an agreement for the employment.²⁴ If the owner has so conducted himself that the broker, acting fairly, had the honest belief that a lawful request had been made to him by the owner to render services as a broker in the sale of the owner's real estate, and if the broker, acting on such request, rendered such services, then the law would imply a promise by the owner to pay to the broker what the services were reasonably worth.

Or, if the broker, without having been requested so to do, rendered services as a broker in the sale of the owner's real estate, under circumstances indicating that he expected to be paid therefor, and the owner, knowing such circumstances, availed himself of the benefit of those services, then the law would imply a promise by the owner to pay to the broker what those services were reasonably worth.²⁵ Nor is an express promise to pay commissions necessary. If the services were requested and a sale results from the broker's efforts, the law implies the promise to pay.²⁶

²⁴ *Ballentine v. Boone*, 130 Mo. App. 616 (1908).

²⁵ *Weinhouse v. Cronin*, 68 Conn. 253 (1896).

²⁶ *Jones v. Moore*, 30 Ky. Law Rep. 603 (1907).

But the principle that, when a party knowingly *and without objection* permits another to render services for him, the law implies a promise to pay what the same are reasonably worth, applies only when one *knows* that services are being rendered *for him*, and does not apply where the vendor may assume that the broker was acting for the purchaser.²⁷

§ 112. Ratification Must Be with Full Knowledge of Facts.

“Whatever may be the rule in cases where the rights of third persons are involved, as between the immediate parties to the transaction, ratification implies a conscious and intended approval of the act done. It rests upon the actual and existing purpose to make such approval; and to meet this requirement it must be made with full knowledge of all the facts.²⁸ * * * Before one is called upon to ratify any unauthorized transaction which has been undertaken for him he is entitled to have all the facts put before him, and then he is entitled to a reasonable time in which to act before he can be compelled to take his position with regard to the transaction. (*Hopkins v. Clark*, 7 App. Div. (N. Y.) 207, 213, and authority there cited.)”²⁹

Before ratification of the broker's acts can be inferred, knowledge of the facts on the principal's part must be shown.³⁰ “It is essential to the ratification by the principal of the unauthorized acts of his agent, or of another, that he should know what were the acts of him who assumed to act as his agent, for there can be no ratification of unauthorized acts without knowledge of them. Therefore, when an agent assumes to enter into a contract which is not authorized by his agency, before

²⁷ *Downing v. Buck*, 135 Mich. 638 (1904).

²⁸ Citing *Glenn v. Garth*, 133 N. Y. 18, 35.

²⁹ *Burnham v. Lawson*, 118 App. Div. 391 (N. Y. 1907).

³⁰ *Maze v. Gordon*, 96 Cal. 61 (1892).

his principal can be said to have ratified it, it must be proved that he knew, or was charged with knowledge, of the facts regarding the transaction and the terms of such contract.”³¹

Knowledge of the facts, however, must not be confounded with knowledge of the legal effect of the facts. Where, for instance, a party knows the contents of a paper, and that the same was executed by his agent in his (the principal's) name, it is not necessary that the principal should be informed of the legal effect of those facts.³²

If a party has the right to disaffirm an act of a supposed agent, the number of grounds upon which disaffirmance may be placed is immaterial. The agent's action, if unauthorized, does not bind the principal unless and until by some act of ratification he binds himself. By ratifying, he waives any right to disaffirm upon any ground, known or unknown. An agent is presumed to have disclosed to his principal, within a reasonable time, all of the material facts that came to his knowledge while acting within the scope of his authority. After the lapse of sufficient time, the principal is presumed to have acted with knowledge of all the acts of his agent in the line of his agency.³³

³¹ *Sterling v. De Laune*, 105 S. W. 1169 (Tex. 1907).

³² *Clark v. Hyatt*, 118 N. Y. 567 (1889).

³³ *Clark v. Hyatt*, 118 N. Y. 568, 569 (1889).

CHAPTER XI.

BROKER MUST BE PROCURING CAUSE OF SALE.

§ 113. General Statement.

The broker must be the "procuring cause" of the sale. (§§ 116-120.) Promises to pay commissions are not enforceable if there is no consideration to support them. (§ 121.) Unsuccessful efforts give the broker no claim against the principal. (§§ 122, 123.) If the purchaser takes title in another person's name, the broker is not thereby deprived of commissions. (§ 124.)

It is not indispensable that the purchaser should be introduced to the principal by the broker, nor that the broker should be personally acquainted with the purchaser, nor that the broker be present and an active participator in the agreement, if the sale is effected through his agency. (§§ 125-127.) Advertisements of the broker may be the inducing cause of the sale and entitle him to commissions. (§ 128.)

When the proposed purchaser abandons the broker, or if the broker gives up the negotiations, the owner may sell to the same purchaser induced to purchase by another, without becoming liable to the first broker for commissions. (§ 129.) While the principal may not take the sale into his own hands, without terminating the agency, yet where the broker abandons the negotiations, the employer may subsequently sell to the same person without liability for commissions. (§ 130.)

§ 114. Methods of Earning Commission.

"At least three different methods of earning a commission under an agency contract for the sale of real

estate may be provided: First, by effecting a binding contract of sale under authority given to the agent to make such contract for the principal;¹ second, by producing a purchaser to whom a sale is in fact made; third, by producing a purchaser ready, willing and able to buy on terms specified in the agency agreement."² A real estate broker may be employed simply to find a purchaser either generally or upon certain terms, or he may be employed to procure a binding contract of sale. The latter class of cases is rare and the general duties of the broker do not require him to go so far.³ While the general obligation of the broker is to bring the buyer and seller to an agreement (that is, a meeting of the minds upon the terms), this general obligation may be varied by contingencies and broadened or narrowed by specific contract.⁴ A broker may, by agreement with his principal, so contract as to make his compensation depend upon a contingency which his efforts cannot control, even though it relates to the acts of his principal,⁵ and the broker is bound by his contract even though it be a hard one.⁶

§ 115. Obligations of the Broker.

There has been some attempt, also, to draw a very fine distinction concerning the broker's obligation. In one case,⁷ it was said that "The authorities recognize a distinction between the employment of a broker to find or procure a purchaser for the property of another, and the employment of a broker to effect and close a sale of such property. In the one case the broker finds the

¹ As to when the broker has authority to sign a contract, see §§ 38-41 *supra*.

² *McDermott v. Mahoney*, 115 N. W. 36 (Iowa 1908).

³ *Platt v. Johr*, 9 Ind. App. 60 (1893).

⁴ *Parker v. Walker*, 86 Tenn. 568 (1888); *Hinds v. Henry*, 36 N. J. L. 328 (1873).

⁵ See §§ 230 *et seq.* as to agreements to wait for commissions, making commissions depend upon passing of title, etc.

⁶ *Colonial Tr. Co. v. Pacific Co.*, 158 Fed. 279 (1907).

⁷ *Wiggins v. Wilson*, 45 So. 1013 (Fla. 1908).

purchaser and produces him to the property owner, who negotiates and effects the sale with such purchaser; in the other case, the broker not only finds the purchaser, but negotiates the sale with him on the terms authorized by his principal, leaving nothing for the seller to do but execute the necessary transfers of the title to the property."

But in *McFarland v. Lillard*, 2 Ind. App. 163 (1891), it was held that there is no meritorious distinction between the case of an agent undertaking to sell and one undertaking to find a purchaser; the court saying, "The broker, in either case is required to do no more than find a purchaser. He can not do the selling, unless specially authorized to do so by power of attorney.⁸ That must be done by the principal. The undertaking to 'sell' in such cases is no more than an engagement to find a purchaser who is ready and willing to buy."⁹

"Whether a broker is to 'introduce' a purchaser, or to 'find' or 'procure' one, or whether he is to do all these things combined, his duties remain practically the same. The words 'find,' 'procure,' 'introduce,' are generally used synonymously in the making of such contracts, and, whether used conjunctively or disjunctively, the essential thing they require the broker to do is to secure a customer who is or will become a purchaser."¹⁰

"The verb 'sell' and the noun 'sale' vary in meaning according to the different contexts in which they are used. Ordinarily a sale is an executed contract—a completed transaction binding on seller and buyer alike. In contracts creating the relationship of principal and real estate broker, however, a different meaning is generally given by construction. The broker 'sells' when he finds a purchaser ready, able and willing to buy on the terms

⁸ See the Indiana statutes as to who may make contract in that state.

⁹ Citing *Treat v. De Celis*, 41 Cal. 202; *Duffy v. Hobson*, 40 Cal. 240; *Goss v. Broom*, 31 Minn. 484; *Reynolds v. Tompkins*, 23 W. Va. 229; *Lockwood v. Rose*, 125 Ind. 588.

¹⁰ *Platt v. Johr*, 9 Ind. App. 60 (1893).

proposed by the principal. A contract for commissions on sales entitles the broker to the specified compensation whenever, through his influence, such a prospective purchaser has been brought to the principal, though by reason of some fault or disinclination of the latter, the sale is never completed, or is consummated on terms somewhat different from those originally proposed by the principal.”¹¹

In *Covey v. Henry*, 71 Neb. 124 (1904), it was contended that there is a distinction between an agent to sell and an agent to find a buyer; that in the one case the agent has power to make the sale and bind his principal, while in the other he has not. The court said: “As between the seller and the agent this is a distinction without a difference, for in either case, if there were a valid employment, the seller would be liable to the agent for his commission if he made a sale or found a buyer. The only difference to be found in this distinction is that, in the former case, the buyer could demand performance by the seller, while in the latter case he could not.”

§ 116. Procuring Cause.

“The undertaking of the broker is to make efforts to procure a purchaser, but if he fails he is entitled to no pay unless there is a special contract.”¹² “A broker for the sale of real estate is entitled to his commission when, in the language of the cases, he ‘is the procuring cause of the sale’; that is, when he has found a purchaser and brought him to his employer and a contract is made between them for the sale of the property, or the purchaser is ready to purchase and the seller refuses or is unable to consummate the sale.”¹³

¹¹ *Humphries v. Smith*, 5 Ga. App. 342 (1908).

¹² *Sussdorff v. Schmidt*, 55 N. Y. 321 (1873).

¹³ *Fraser v. Wyckoff*, 63 N. Y. 445 (1875); *Hoadley v. Savings Bank of Danbury*, 44 L. R. A. 321 (1899); *Lunney v. Healey*, 44 L. R. A. 593 (1898).

That the seller's wife refused to consent to the arrangements, thereby defeating a sale, cannot deprive the broker of commissions, if the other requisites exist.¹⁴ The same is true even though the property be the homestead. In *Young v. Ruhwedel*, 119 Mo. App. 241 (1906) the court said: "It is urged that as the farm was the homestead of defendant and his wife, and therefore their joint estate, the contract of employment must be held void because the wife was not a party to it. Recently, in the case of *Curry v. Whitmore*, 111 Mo. App. 204, where the sale made by the agent employed by the husband alone was defeated by the refusal of the wife to sign the deed, we answered the argument that the husband could not sell the homestead without his wife's consent by saying, 'Neither can a husband sell any other lands and make perfect title without his wife's consent. But neither of these conditions will relieve him of liability on his contract for the sale of such lands. That is a matter he should think of and provide against at the time he enters into his obligations.' If plaintiff produced a purchaser possessing the requisite qualifications, defendant offered no legal excuse for his failure to consummate the sale in the fact of his wife's refusal to sign the deed."¹⁵

**§ 117. What is Required to Constitute a Broker a
"Procuring Cause."**

The broker may, by special agreement, impose on himself any variety of conditions upon which his right to commissions should depend, but, under the usual employment, the broker is entitled to his commissions when he procures a contract of sale or produces a purchaser, ready, willing and able to purchase on his principal's

¹⁴ *Goldberg v. Gelles*, 33 Misc. 797 (N. Y. 1901); *Brauch v. Moore*, 105 S. W. 1180 (Ark. 1907).

¹⁵ Citing *McCray & Sons v. Pfost*, 118 Mo. App. 672.

terms. This is the rule which is supported by the weight of judicial opinion.¹⁶

There are some authorities which hold that the broker must go further and procure an executed contract before he is entitled to commissions, stating that "to procure a purchaser" requires the procuring of an enforceable contract.¹⁷

The requirement is discussed at length in *Wilson v. Mason*, 158 Ill. 310, 311 (1895), as follows: "Some of the cases go so far as to hold, that the broker is not entitled to his commissions unless the sale is actually accomplished by the delivery of the deed of the land from the vendor to the vendee and the payment of the purchase money by the latter, or unless it is proven that the sale is prevented by the fault of the vendor. Other cases

¹⁶ *Mooney v. Elder*, 56 N. Y. 238 (1874); *Duclos v. Cunningham*, 102 N. Y. 678 (1886); *Gilder v. Davis*, 137 N. Y. 506 (1893); *Martin v. Bliss*, 57 Hun 157 (N. Y. 1890); *Brady v. Foster*, 72 App. Div. 416 (N. Y. 1902); *Suydam v. Healy*, 93 App. Div. 396 (N. Y. 1904); *King v. Knowles*, 122 App. Div. 414 (N. Y. 1907); *Scott v. Neuberger*, 58 Misc. 22 (N. Y. 1908); *Rae Co. v. Kane*, 132 App. Div. 935 (N. Y. 1909); *Hinds v. Henry*, 36 N. J. L. 332 (1873); *Ryer v. Turkel*, 70 Atl. 68 (N. J. 1908); *Fisher Co. v. Realty Co.*, 159 Mo. 562 (1900); *Gerhart v. Peck*, 42 Mo. App. 651 (1890); *Morgan v. Keller*, 194 Mo. 680 (1905); *Hannan v. Prentiss*, 124 Mich. 419 (1900); *Flower v. Davidson*, 44 Minn. 46 (1890); *Covey v. Henry*, 71 Nebr. 124 (1904); *McFarland v. Lillard*, 2 Ind. App. 163 (1891); *Platt v. Johr*, 9 Ind. App. 60 (1893); *Vinton v. Baldwin*, 88 Ind. 105, 106 (1882), (citing *Lane v. Albright*, 49 Ind. 275; *Love v. Miller*, 53 Ind. 294; 21 Am. R. 192; *Reyman v. Mosher*, 71 Ind. 598; *Moses v. Bierling*, 31 N. Y. 462; 24 Alb. L. J. 536; *Hart v. Hoffman*, 44 How. Pr. 168; and *Pickett v. Badger*, 1 C. B. (N. S.) 296); *Creveling v. Wood*, 95 Pa. St. 157 (1880); *Lockwood v. Halsey*, 41 Kans. 170 (1889); *Mears v. Jones*, 102 Me. 490 (1907); *Jones v. Moore*, 30 Ky. Law Rep. 605 (1907); *Yoder v. Randol*, 83 Pac. 537 (Okla. 1905); s. c., 3 L. R. A. (N. S.) 576; *Lunney v. Healey*, 44 L. R. A. 623 (1898); *McLaughlin v. Wheeler*, 1 S. D. 521 (1891), (citing *Hamlin v. Schulte*, 34 Minn. 534; 27 N. W. 301; and *Hannon v. Moran*, 71 Mich. 261; 38 N. W. 909); *Block v. Ryan*, 4 App. Cas. D. C. 283 (1894); *Dotson v. Milliken*, 27 App. D. C. 514 (1906), (citing *Koch v. Emmerling*, 22 How. 69; 16 L. Ed. 292; *McGavock v. Woodlief*, 20 How. 221; 15 L. Ed. 884; *Bryan v. Albert*, 3 App. D. C. 180, 181; *Cheatham v. Yarbrough*, 90 Tenn. 77, 79; 15 S. W. 1076; *Washburn v. Bradley*, 169 Mass. 86, 88; 47 N. E. 512; *Holden v. Starks*, 159 Mass. 503; 38 Am. St. Rep. 451; 34 N. E. 1069; and *Knapp v. Wallace*, 41 N. Y. 477); *Cheatham v. Yarbrough*, 90 Tenn. 79 (1891), (citing *Mech. on Agency*, §§ 966, 967; 2 Am. & Eng. Ency. of Law, 578, 581; 2 Add. on Contracts (Morg. Ed.), § 931; *Cook v. Fish*, 12 Gray 493; 88 Ind. 104; s. c., 45 Am. R. 447; 57 Cal. 224; 31 Md. 270; *Gilchrist v. Clarke*, 2 Pickle 585; *Parker v. Walker*, 2 Pickle 569, and dissenting opinion in the same case, 573); *Fitzpatrick v. Gilson*, 176 Mass. 477 (1900), (citing *Middleton v. Thompson*, 163 Penn. 112; *Fischer v. Bell*, 91 Ind. 243; *Vinton v. Baldwin*, 88 Ind. 104; *Peet v. Sherwood*, 43 Minn. 447; *Budd v. Zoeller*, 52 Mo. 238; *Buckingham v. Harris*, 10 Colo. 455; *Cook v. Welch*, 9 Allen 350; *Desmond v. Stebbins*, 140 Mass. 339; and *Keys v. Johnson*, 68 Penn. St. 42); *Monroe v. Snow*, 131 Ill. 136 (1891), (citing *McGavock v. Woodlief*, 28 How. 221; *Doty v. Miller*, 43 Barb. (N. Y.) 529; and *Bailey v. Chapman*, 41 Mo. 537). But see *Wilson v. Mason*, 158 Ill. 310 (1895), a fairly full quotation from which is given in this section. In another Illinois case, decided before *Wilson v. Mason*, it was said: "In order to be entitled to commissions it is indispensable that the broker should show that he has produced a purchaser ready and willing to take the property on the terms specified, or that his efforts were the procuring cause of the sale which the principal has made to the purchaser with whom he has been brought into communication." *Davis v. Gassette*, 30 Ill. App. 47 (1888).

¹⁷ *Parker v. Walker*, 86 Tenn. 569 (1888). See also *Emery v. Atlanta Exchange*, 88 Ga. 326 (1891). See also § 118.

seem to hold that the broker is entitled to his commissions when the minds of the vendor and purchaser meet in a verbal agreement for the sale by the one and the purchase by the other of the land. We are not inclined to follow either of these classes of cases, regarding them as extreme and exceptional. The true rule is, that the broker is entitled to his commissions, if the purchaser presented by him and the vendor, his employer, enter into a valid, binding and enforceable contract. If, after the making of such a contract, even though executory in form, the purchaser declines to complete the sale and the seller refuses to compel performance, the broker ought not to be deprived of his commissions. He has done all that he can do when he produces a party who is able, and, in binding form, offers to purchase upon the proposed terms. An agreement by a real estate broker to procure a purchaser not only implies that the purchaser shall be one able to comply, but that the seller and the purchaser must be bound to each other in a valid contract. So, where the agreement of the real estate broker is to make a sale, his commission is earned when a contract is entered into which is mutually obligatory upon the vendor and vendee, even though the vendee afterwards refuses to execute his part of the contract of sale or purchase.¹⁸

“An oral agreement upon the part of the purchaser of land would not be a valid agreement; and if he refused to complete the sale of the land after such oral agreement, without fault upon the part of the seller, the obligation of the broker would not be fulfilled, and he could not recover his commissions.¹⁹ Nor would a writ-

¹⁸ Citing *Parker v. Walker*, 86 Tenn. 506; *Coleman's Exrs. v. Mead*, 13 Bush. 358; *Francis v. Baker*, 45 Minn. 83; *Love v. Miller*, 53 Ind. 294; *Veazie v. Parker*, 72 Me. 443; *Willes v. Smith*, 77 Wis. 81; *Rice v. Mayo*, 107 Mass. 550; *Christensen v. Wooley*, 41 Mo. App. 53; *Love v. Owens*, 31 Mo. App. 501; *Greene v. Hollingshead*, 40 Ill. App. 195; *Short v. Millard*, 68 Ill. 292; *Kerfoot v. Steele*, 113 Ill. 610; *Ward v. Cobb*, 148 Mass. 518.

¹⁹ Citing *Parker v. Walker*, *supra*; *Middleton v. Findla*, 25 Cal. 76; *Whitney v. Cochran*, 1 Scam. 209; *Christensen v. Wooley*, *supra*.

ten agreement be binding upon the purchaser of land, under the Statute of Frauds, if such agreement were signed for him by some other person not lawfully authorized in writing to do so.”²⁰ And at page 314 the court says: “If the contract is of such a character, that the vendee can successfully plead the Statute of Frauds against its performance in a suit therefor by the vendor, then it is not a valid contract entitling the broker to his commissions within the rule already laid down.”²¹

In other cases there are expressions which lend color to this view. Thus in *Flynn v. Jordal*, 124 Iowa 458 (1904), it was said that where no sale was actually consummated the broker to be entitled to commissions must either have procured a valid obligation to buy, or have brought the proposed purchaser and the vendor together so that a contract of sale might have been entered into if the vendor had so elected.

And in *Kifer v. Yoder*, 198 Pa. St. 308 (1901), it was said: “It is always incumbent upon a broker seeking to recover a commission, to prove either that a sale was made to the party whom he procured as a purchaser, or that the purchaser was able and willing to buy and the failure to make an actual sale was through no fault of the broker or his customer.”²²

§ 118. Procuring Cause as Affected by Special Contract.

A special contract supersedes the general rule as to commissions, and when such a contract exists the broker must, of course, comply with its terms before he is entitled to commissions.

“Upon the general question concerning the services to be performed by a land broker or agent to entitle him to recover upon a contract for commissions, there is much

²⁰ Citing Ill. Rev. Stat., Ch. 59, § 2; *Cloud v. Greasley*, 125 Ill. 313; *McGinnis v. Fernandes*, 126 Ill. 228.

²¹ *Cf. Monroe v. Snow*, 131 Ill. 136 (1891). See also § 118.

²² See also *Fraser v. Wyckoff*, 63 N. Y. 445 (1875).

confusion in the cases. It is apparently held by some Courts that the production of a purchaser who is ready and willing to buy upon the authorized terms, is all that is required to entitle the agent to the agreed compensation.²³ Other cases hold to the rule that, under a contract giving the agent authority to sell, and providing a commission for such service, the mere production of a purchaser who is willing to buy upon the stated terms is not sufficient, but an actual sale or binding contract of sale must be shown before a recovery can be had upon the agreement.²⁴ Many of the decisions involving agent's and broker's commissions turn, more or less, upon the effect of the custom obtaining in such business, and upon implied obligations growing out of the peculiar circumstances in the case decided. But where, as in this case, there is a special contract expressly stating the terms and conditions of the obligation entered into, there is no room for implication, nor can its terms be controlled by reference to custom. Consigney's contract empowered him to make a sale, to collect the cash payments, and to retain therefrom his commissions. By his petition he alleges that he did, in fact, make a sale, which appellants wrongfully refused to carry out by making the proper conveyance. Upon such a claim, based upon such an agency we have heretofore held that the recovery of commissions depends upon a 'consummated sale'—not necessarily a sale consummated by the delivery of deeds of conveyance, but such a contract as will be enforced by the Courts if enforcement be demanded. *Felts v. Butcher*, 93 Iowa 414. The doctrine of this decision is well

²³ Citing *Knapp v. Wallace*, 41 N. Y. 479; *Davis v. Lawrence*, 52 Kans. 383; 34 Pac. Rep. 1051; *Parker v. Walker*, 86 Tenn. 566; 8 S. W. Rep. 391; *Potvin v. Curran*, 13 Neb. 302; 14 N. W. Rep. 400.

²⁴ Citing *Hammond v. Crawford*, 66 Fed. Rep. 425; 14 C. C. A. 109; 35 U. S. App. 1; *Norman v. Reuther*, 25 Misc. Rep. 161; 54 N. Y. Supp. 152; *Keys v. Johnson*, 68 Pa. 42; *Haydock v. Stow*, 40 N. Y. 363; *Wilson v. Mason*, 158 Ill. 304; 42 N. E. Rep. 134; 49 Am. St. Rep. 162; *Olson v. Jodon*, 38 Minn. 468; 38 N. W. Rep. 485; *Richards v. Jackson*, 31 Md. 250; 1 Am. Rep. 49; *De Santos v. Taney*, 13 La. Ann. 152; *Dorrington v. Powell*, 52 Neb. 440; 72 N. W. Rep. 587; *Drury v. Newman*, 99 Mass. 256; *Bradford v. Menard*, 35 Minn. 197; 28 N. W. Rep. 248.

supported by the authorities. In *Wilson v. Mason* (158 Ill. 304; 42 N. E. Rep. 134; 49 Am. St. Rep. 162) the Illinois Court reviews the leading precedents and holds the true rule to be that the commission of an agent who undertakes to sell (as distinguished from a mere agreement to find a purchaser) 'is earned when a contract is entered into which is mutually obligatory upon the vendor and the vendee.' This holding is fully sustained by the other cases in the list last above cited (see footnote 24) as well as many more to which no special reference is here made. The rule of the *Felts* case is controlling in the present controversy. The cross-petitioner's action is based upon a special contract of agency to sell, and he can recover only by proof of a sale in fact; that is, a sale so far consummated as to be valid, binding and mutually obligatory upon the parties—vendor and vendee. That a completed sale as a basis for the recovery of commissions was contemplated by the parties, is shown in the stipulation, which authorized the agent to retain his compensation from the first cash installment of the price for which the property might be sold. In a case very similar to the one at bar, where the agent's commission was to be the excess obtained over a fixed net price, the Supreme Court of Minnesota has said that a provision of this kind 'involves the proposition that a sale shall be consummated' before an action by the agent on the contract will be sustained.²⁵

"In the preceding division of this opinion, we have held that no contract was effected between Ormsby and Consigney which equity will enforce against appellants. This alone has been held sufficient to defeat a claim for agent's commissions for negotiating an alleged sale.²⁶ And such seems to be the logical import of the opinions of this Court in *Felts v. Butcher*, 93 Iowa 414, and *Burns*

²⁵ Citing *Cremer v. Miller*, 56 Minn. 52; 57 N. W. Rep. 318.

²⁶ Citing *Simonson v. Kissick*, 4 Daly 143; *Crombie v. Waldo* (Super. Ct. N. Y.), 17 N. Y. Supp. 373.

v. Oliphant, 78 Iowa 456. See also Wilson v. Mason, 158 Ill. 304; 42 N. E. Rep. 134; 49 Am. St. Rep. 162, and Ward v. Cobb, 148 Mass. 518; 20 N. E. Rep. 174; 12 Am. St. Rep. 587, which, while not parallel cases, have a bearing upon the principle under discussion.”²⁷

§ 119. General Rule as to “Procuring Cause.”

As will be noted, there is some conflict of opinion as to when the agent's commission is earned; in other words, as to when he is the “procuring cause,” some of the authorities holding that the procuring of an enforceable contract of sale is requisite to recovery. In some instances the authorities cited for the latter proposition do not sustain it, but are based on the particular nature of the employment, or relate to an exchange of property, or the procuring of a lease and not to a sale.

A suggestion will, in connection with what has been already said, assist in giving the proper emphasis to the point really decided in these cases. Some of them sustain the proposition that the broker is not the procuring cause unless he secures an executed contract of sale. But it is not true that the authorities cited for the proposition *all* sustain it. On the contrary, it will be found that some do not and that the text writers and even the judges who do, stumble to their conclusions.

The cases do say with one accord that the broker is entitled to commissions *when* he procures a contract of sale, but they do not mean that the broker *must* procure a contract of sale *before* he is entitled to commissions. The emphasis should be on this, that if he does procure such a contract his commissions are earned. But by weight of authority they would have been earned also had he not procured the contract, but instead produced a purchaser ready, willing and able to purchase.

²⁷ Ormsby v. Graham, 123 Iowa 213, 216 (1904).

One illustration will suffice to show how easily errors are made in this matter. In a comparatively recent case, already cited, but which we refrain from now singling out, the court said that some cases hold that the broker must procure the contract to earn his commission, and cited authority for the statement. Yet the very first supporting citation does not really sustain the proposition. In this cited case the *fact* was that the broker had procured a contract of sale and the court very rightly said that this entitled him to his commission, but nowhere in the entire opinion was it said that the procuring of the contract was essential. There are not a few cases cited in support of the statement that an executed contract of sale is required for recovery of commissions, which are as inadequate.

The statements of the present chapter have been purposely confined to the discussion of a sale or exchange. Some authorities hold that the case of a broker negotiating a loan or a lease is the same as that of a broker negotiating a sale, while others apply a somewhat different rule to a loan or lease. There are states—Illinois, for example—where, as has already been indicated, even the decisions of the same court conflict on the question as to when the broker is the procuring cause of a sale. So there are instances—New York, for example—where the rule applied to loans is somewhat different from that applied to sales. The subject of commissions on exchanges, on loans and on leases is discussed in Chapters XVIII-XX of the present volume.

§ 120. "Procuring Cause" when Representing Purchaser.

A broker engaged by a prospective purchaser to purchase property must, in order to entitle himself to a commission from the prospective purchaser, either procure

from the owner and deliver to the purchaser a valid contract for sale which could be enforced by the purchaser, or obtain from the owner a verbal agreement to make the sale, and bring the owner and prospective purchaser together so that the latter may have an opportunity to procure such a contract.²⁸

Where the broker represents the purchaser and has authority to buy at a fixed price, the broker earns his commission when he produces a vendor and his principal makes a valid, binding agreement with this vendor, and the broker's right to his commission is not affected by the inability or refusal of the vendor to deliver the property. In such a case, the broker has not produced a vendor able to deliver the property, and would not have earned his commission had it not been that his principal, by contracting with the vendor, had accepted him.²⁹

§ 121. Effect of Promises to Pay Commission.

Acknowledging in the contract an indebtedness to the broker to the amount of his customary commission, may be taken as an admission that the sale was effected through the agency of the broker.³⁰

But even where the owner actually promises to pay the broker commissions, under the belief that the broker was the procuring cause of the sale, he may nevertheless resist payment, and successfully too, if in fact the broker was not the procuring cause.³¹

Without an employment, or the performance by the broker of some service at the request, express or implied, of the principal, a promise by the latter to pay commissions has no consideration for its support and no liability to pay is created by it.³² And so it was said that in the

²⁸ Logan v. McMullen, 87 Pac. 285 (Cal. 1906). See also § 117 *supra*.

²⁹ Roche v. Smith, 176 Mass. 595, at 597, 598; 51 L. R. A. 510 (1900).

³⁰ Redfield v. Tegg, 38 N. Y. 214 (1868).

³¹ Bellesheim v. Palm, 54 App. Div. 77 (N. Y. 1900).

³² Myers v. Dean, 132 N. Y. 71, 72 (1892).

absence of a written contract of employment, as required by the New Jersey statute,³³ a subsequent promise to pay commission is without consideration.³⁴ And where the promise to pay commission is made after the sale is already consummated, there is said to be no consideration for the promise.³⁵

§ 122. Unsuccessful Efforts.

In one of the leading cases,³⁶ the New York Court of Appeals says: "A broker is never entitled to commissions for unsuccessful efforts.³⁷ The risk of failure is wholly his. The reward comes only with his success. That is the plain contract and contemplation of the parties. The broker may devote his time and labor, and expend his money with ever so much of devotion to the interests of his employer, and yet if he fails; if without effecting an agreement or accomplishing a bargain, he abandons the effort, or his authority is fairly and in good faith terminated, he gains no right to commissions. He loses the labor and effort which was staked upon success. And in such event it matters not that after his failure, and the termination of his agency, what he has done proves of use and benefit to the principal. In a multitude of cases that must necessarily result. He may have introduced to each other parties who otherwise would have never met; he may have created impressions which, under later and more favorable circumstances, naturally lead to and materially assist in the consummation of a sale; he may have planted the very seeds from which others reap the harvest; but all that gives him no

³³ See § 16 *supra*.

³⁴ *Leimbach v. Regner*, 70 N. J. L. 609, 610 (1904). See also §§ 330, 333.

³⁵ *Wolverton v. Tuttle*, 94 Pac. 963 (Ore. 1908).

³⁶ *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 383 (1880).

³⁷ See *Patten v. Willis*, 134 Ill. App. 649 (1907); *Newton v. Conness*, 106 S. W. 893 (Tex. 1908); *Raleigh R. E. & T. Co. v. Adams*, 145 N. C. 166 (1907); *Smith v. Kimball*, 193 Mass. 585 (1907). As to consideration for promise to pay commission though the broker is unsuccessful, see *Kimmel v. Skelly*, 130 Cal. 555 (1900). See also §§ 80-84.

claim. It was part of his risk that failing himself, not successful in fulfilling his obligation, others might be left to some extent to avail themselves of the fruit of his labors. As was said in *Wylie v. Marine National Bank*, 61 N. Y. 416, in such a case, the principal violates no right of the broker by selling to the first party who offers the price asked, and it matters not the sale is to the very party with whom the broker had been negotiating. He failed to find or produce a purchaser upon the terms prescribed in his employment, and the principal was under no obligation to wait longer that he might make further efforts. The failure, therefore, and its consequences, were the risk of the broker only.”³⁸

In *Garcelon v. Tibbets*, 84 Me. 148 (1891), the court said: “It is now the well-settled doctrine, that in the absence of any usage, or contract, express or implied, or conduct of the seller preventing a completion of the bargain by the broker, an action by the broker for his commissions will not lie until it is shown that he has effected or procured a sale of the property. It is not enough that the broker has devoted his time, labor or money to the interests of his employer. Unsuccessful efforts, however meritorious, afford no ground of action. Where his acts effect no agreement or contract between his employer and the purchaser, the loss must be his own. He loses his labor and effort which he staked upon success. If no contract, then no reward. His commissions are based upon the contract of sale.”³⁹ Of course, there may be contracts between the broker and his employer, by the terms of which the broker may become entitled to his commissions, even though a bargain or sale may not be effected. In such cases the terms of the contract must govern, as

³⁸ See § 158 *infra*; also § 242 *infra*.

³⁹ Citing *Viaux v. Old South Society*, 133 Mass. 1, 10; *Loud v. Hall*, 106 Mass. 404, 407; *Tombs v. Alexander*, 101 Mass. 255; *Koch v. Emmerling*, 22 How. (U. S.) 69; *Glentworth v. Luther*, 21 Barb. (N. Y.) 147; *Drury v. Newman*, 99 Mass. 256; *Sibbald v. The Bethlehem Iron Co.*, 83 N. Y. 383; *Cook v. Welch*, 9 Allen (Mass.) 350; *Veazie v. Parker*, 72 Me. 443; *Rockwell v. Newton*, 44 Conn. 337.

in *Chapin v. Bridges*, 116 Mass. 105, and *Rice v. Mayo*, 107 Mass. 550."

§ 123. Failure Through Fault of Principal.

The broad statement that the broker when unsuccessful gains nothing from his labor and effort, "must be taken with one important and necessary limitation. If the efforts of the broker are rendered a failure by the fault of the employer; if capriciously he changes his mind, after the purchaser, ready and willing, and consenting to the prescribed terms, is produced; or if the latter declines to complete the contract because of some defect of title in the ownership of the seller, some unre-moved encumbrance, some defect which is the fault of the latter, then the broker does not lose his commissions. And that upon the familiar principle that no one can avail himself of the non-performance of a condition precedent, who has himself occasioned its non-performance. But this limitation is not even an exception to the general rule affecting the broker's right, for it goes on the ground that the broker has done his duty, that he has brought buyer and seller to an agreement, but that the contract is not consummated and fails through the after-fault of the seller. The cases are uniform in this respect."⁴⁰

§ 124. Purchaser Taking Title in Another's Name.

"An agent cannot be deprived of his commission merely because the actual purchaser takes title in another's name."⁴¹ And a broker does not lose his commission simply because the purchaser he produced did not buy in person but through an agent, provided the agency is known to the owner of the property.⁴²

⁴⁰ *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 383 (1880).

⁴¹ *Konner v. Anderson*, 32 Misc. 511 (N. Y. 1900), (citing *Randrup v. Schroeder*, 22 Misc. 367).

⁴² *Minster v. Benoliel*, 32 Misc. 630 (N. Y. 1900). As to the matter of knowledge on the vendor's part that the purchaser is the broker's customer, see § 130 *infra*.

§ 125. Effort Required of Broker.

“The broker must be the efficient agent or procuring cause of the sale.”⁴³ It is not indispensable that the purchaser should be introduced to the owner by the broker, nor that the broker should be personally acquainted with the purchaser; but in such cases it must affirmatively appear that the purchaser was induced to apply to the owner through the means employed by the broker.⁴⁴ But “to earn a commission for effecting the sale of real estate, a broker must do something more than get authority from the owner to negotiate the sale. He must be the effectual cause of the sale. He must find the purchaser, or at the very least induce a purchaser to buy the property at a price acceptable to the owner, and the sale must proceed from his efforts.”⁴⁵ Where, for instance, a person ascertained that A desired to sell or exchange, and presented A’s card to B which resulted in an exchange, held, the broker was not entitled to commission.⁴⁶

“All the cases agree that the disclosure of the purchaser’s name and the putting of him in communication with the defendant by the plaintiff must be not only the foundation upon which the negotiation was *begun*, but upon which it was *conducted* and the sale ultimately *made*.⁴⁷ The broker must be shown to be the *procuring cause* of the sale. The intervention of the plaintiff in beginning the negotiations, and their subsequent culmination in a sale, will not suffice unless *those negotiations* were the ultimate cause of the sale.”⁴⁸

“To entitle a broker to commissions, he must have

⁴³ King Powder Co. v. Dillon, 96 Pac. 441 (Colo. 1908); Platt v. Johr, 9 Ind. App. 61 (1893).

⁴⁴ Sussdorff v. Schmidt, 55 N. Y. 322 (1873). And see § 96 *supra*.

⁴⁵ Scherer v. Colwell, 43 Misc. 391 (N. Y. 1904); Ayres v. Thomas, 116 Cal. 144 (1897); Burch v. Hester, 109 S. W. 399 (Tex. 1908).

⁴⁶ See Walton v. M’Morrow, 63 App. Div. 147 (N. Y. 1901); *aff’d*, 175 N. Y. 493 (1903), no opinion.

⁴⁷ Citing Keener v. Harrod, 2 Md. 71; Hollyday v. Southern Agency, 100 Md. 296.

⁴⁸ Walker v. Baldwin, 106 Md. 619 (1907). See §§ 97, 98 *supra*, 237 *infra* for subject of “Employment of Several Brokers.”

produced a purchaser who was ready, willing and able to purchase the property upon the terms and at a price designated by the principal. Second: The broker must be the efficient agent or procuring cause of the sale. The means employed by him and his efforts must result in the sale. He must find the purchaser and the sale must proceed from his efforts, acting as broker."⁴⁹

"It may be doubtful whether merely advising the consummation of a bargain, of which the efforts of a rival (broker) are the procuring cause, would entitle a broker to commissions. It ought certainly to be shown that the advice given contributed so materially to the result as to be fairly entitled to be regarded as the procuring cause of the transaction."⁵⁰

If a proposed purchaser promises to pay the commission in case he purchases because the vendor would pay no commission, and the property is subsequently sold to a third party, who in turn sells to the proposed purchaser, the question whether the commission was earned should be submitted to the jury.⁵¹

And the broker must procure a purchaser during the term of his employment. (See § 138 and also Ch. X.)

§ 126. Presence of Broker.

The broker need not of necessity be present and an active participator in the agreement of buyer and seller when that agreement is actually concluded.⁵² Brokers are to bring buyer and seller together; they need have nothing to do with the negotiation of the bargain.⁵³ The "sale" which brokers are to make under the ordinary

⁴⁹ *Cole v. Thornburg*, 4 Colo. App. 97 (1893). (citing *Babcock v. Merritt*, 1 Colo. App. 84, and cases cited; *Anderson v. Smythe*, 1 Colo. App. 253).

⁵⁰ *Davis v. Gassette*, 30 Ill. App. 46 (1888).

⁵¹ *Mutchnick v. Friedman*, 135 App. Div. 356 (N. Y. 1909).

⁵² *Colonial Tr. Co. v. Pacific*, 158 Fed. 280 (1907). (citing *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378; *Hoadley v. Savings Bank*, 71 Conn. 599; 42 Atl. 667; 44 L. R. A. 321; *Vreeland v. Vetterlein*, 33 N. J. L. 247; *Keys v. Johnson*, 68 Pa. 42; *McMillan v. Beves*, 77 C. C. A. 444; 147 Fed. 218; *French v. McKay*, 181 Mass. 485; 63 N. E. 1068).

⁵³ *Creveling v. Wood*, 95 Pa. St. 157 (1880).

employment is usually considered as effected when the minds of the buyer and seller are brought to meet.⁵⁴ "He may just as effectually produce and create the agreement, though absent when it is completed and taking no part in the arrangement of its final details."⁵⁵ He must, however, bring the minds of the buyer and seller to an agreement for a sale, and the price and terms on which it is to be made.⁵⁶

Where the broker produced to the owner a proposed purchaser, and a memorandum of the purchase and sale was written out and signed by the seller in duplicate and the proposed purchaser took them and did not sign them in the form they then were, but made some material erasures and interlineations and then signed them, and the seller refused to re-sign them in their altered shape, it cannot be said that there was a meeting of the minds of the parties.⁵⁷

The fact that the broker is not present at the sale is of no consequence, for, to entitle him to compensation, it is sufficient that a sale is effected through his agency, as its procuring cause; and if his communications with the purchaser are the means of bringing him and the owner together, and the sale results in consequence, the compensation is earned, although the broker does not negotiate and is not present at the sale.⁵⁸ And neither need the broker transact the business in person. After he has produced the buyer, the owner may conclude the transaction, and the broker will not lose his commission.⁵⁹ And where the owner concludes the sale at a less sum than that fixed, the broker is entitled at least to a ratable proportion of the agreed commission.⁶⁰

⁵⁴ See § 158, 159 *infra*.

⁵⁵ *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 382 (1880).

⁵⁶ *Id.* And see § 96 *supra*.

⁵⁷ *Bruce v. Hurlbut*, 47 App. Div. 163 (N. Y. 1900). See also §§ 132-138 *infra* as to terms of sale.

⁵⁸ *Hobbs v. Edgar*, 23 Misc. 618 (N. Y. 1898); *Boqua v. Marshall*, 114 S. W. 714 (Ark. 1908).

⁵⁹ *Baker v. Thomas*, 11 Misc. 112 (N. Y. 1895).

⁶⁰ *Martin v. Silliman*, 53 N. Y. 615 (1873).

§ 127. Introductions.

If, as a proximate result of the introduction of the purchaser to the owner by the agent, the owner makes the sale himself, either personally or by another agent, it will not exonerate the owner from the payment of commission to the agent who has initiated the negotiations.⁶¹ “But if the casual connection between the introducing agent and the procurement of the sale be broken, the first agent is not entitled to any commission.”⁶²

An introduction is not necessary if the broker is actually the procuring cause of the sale.⁶³ All that is necessary is for the owner before making the sale himself to acquire the knowledge—it matters not in what manner—that the purchaser is the client of the broker and has been procured by the broker to purchase the specific piece of property at the price and upon the terms designated.⁶⁴

Although it is not essential that the broker should have introduced the buyer to the owner, or even have known the buyer, or that the owner should know that the broker was the producing cause of the sale to the buyer,⁶⁵ yet it must affirmatively appear that the purchaser was induced to apply to the owner through the means employed by the broker.⁶⁶

It is not necessary that the broker should bring the proposed purchaser into the physical presence of the owner, especially so where the owner positively refuses to go on with the sale under any terms.⁶⁷ Where, how-

⁶¹ *Levy v. Wolf*, 84 Pac. 313 (Cal. 1905), (citing *Tyler v. Parr*, 52 Mo. 249; *Jones v. Adler*, 34 Md. 440).

⁶² *Platt v. Johr*, 9 Ind. App. 61 (1893).

⁶³ *Leech v. Clemons*, 14 Colo. App. 48 (1899); *Wright v. McClintock*, 136 Ill. App. 441 (1907). And see § 96 *supra*.

⁶⁴ *Church v. Dunham*, 14 Idaho 782 (1908), (citing *Wood v. Broderson*, 12 Idaho 190; 85 Pac. 490; *Lemon v. De Wolf*, 89 Minn. 465; 95 N. W. 316; note to *Ward v. Cobb*, 12 Am. St. Rep. 589).

⁶⁵ *Colonial Trust Co. v. Pacific Co.*, 158 Fed. 280 (1907).

⁶⁶ *Kalfstein v. Jackson*, 132 App. Div. 1 (N. Y. 1909); *Hafner v. Herron*, 165 Ill. 246 (1897).

⁶⁷ *Getzelsohn v. Donnelly*, 50 Misc. 164 (N. Y. 1906).

ever, "the broker introduces one party to the other and a sale results, unless he is able to show employment, that fact does not entitle him to compensation."⁶⁸ And in *Patten v. Willis*, 134 Ill. App. 651 (1907), the court quotes from *Fessenden v. Doane*, 188 Ill. 228-231, as follows: "One claiming commission for the sale of real estate cannot rightfully claim the benefit of introducing to the defendant a purchaser for the property who had already been introduced to him as such by another party, with and through whom negotiations were already in progress and were continued to a consummation of the sale." The production by the broker of a contract of purchase signed by the purchaser is legally equivalent to the production of the purchaser himself.⁶⁹

§ 128. Advertising.

Where a broker is employed to sell property and he advertises it, and an intending purchaser is attracted by the advertisements, and submits an offer to the broker and this is communicated to the owner, and the negotiations are then continued without interruption until a sale is consummated, the broker is entitled to commissions, even though the sale appears to have been finally consummated between the owner and the purchaser directly.⁷⁰

But where the broker advertised the property in the newspapers, and the broker's attention was attracted to a prospective purchaser by the advertisements of such purchaser, and wrote letters to him, but never saw the purchaser or received any answers to his letters, nor ever introduced the purchaser to the owner, the effectiveness of the broker's instrumentality in bringing about

⁶⁸ *Bright v. Canadian Int. Stock Yard Co.*, 83 Hun 482 (N. Y. 1895). See also "Employment," §§ 103-112 *supra*.

⁶⁹ *Young v. Ruhwedel*, 119 Mo. App. 242 (1906).

⁷⁰ *Doran v. Bussard*, 18 App. Div. 387 (N. Y. 1897); *Bell v. Kaiser*, 50 Mo. 150 (1872); *Goffe v. Gibson*, 18 Mo. App. 4 (1885); *Latta v. King*, 6 D. C. 310 (1868).

the sale must affirmatively appear if commissions are to be recovered.⁷¹

§ 129. Consummation of Sale by Another Broker.

Where a broker opens negotiations for the sale of property and the proposed purchaser abandons the broker, the owner may sell to the same purchaser induced to purchase by another broker, without becoming liable to the first broker for commissions.⁷² But where the principal interferes and assists another broker to bring about the sale by authorizing the second broker to sell for less than the first brokers were authorized to sell, and this while the first brokers were still negotiating with the proposed purchaser, the principal cannot escape liability to the first broker on a sale made to such proposed purchaser.⁷³

Although the parties are originally brought together by the broker, but no terms are agreed upon, and some weeks later the matter is taken up by another broker who finally consummates the sale by bringing the parties to terms, the first broker is not entitled to commissions. To earn his commission the broker must do something more than get authority from the owner to negotiate the sale. He must be the effectual cause of the sale. He must find the purchaser, or at the very least induce a purchaser to buy the property at a price acceptable to the owner.⁷⁴

Where one whose attention was called by the owner's broker to the fact that certain property was for sale refused to make such broker an offer, but immediately afterwards bought the property through another broker whom

⁷¹ *Halterman v. Leining*, 45 Misc. 397 (N. Y. 1904).

⁷² *Wylie v. Marine Nat. Bank*, 61 N. Y. 415 (1875); *Burch v. Hester*, 109 S. W. 399 (Tex. 1908); *Maracella v. Odell*, 3 Daly 123 (N. Y. 1869).

⁷³ *Holland v. Vinson*, 124 Mo. App. 417 (1907). See also "Employment of Several Brokers," §§ 97, 98 *supra*.

⁷⁴ *De Zavala v. Rogaliner*, 45 Misc. 430 (N. Y. 1904). But see *Crone v. Trust Co.*, 85 Mo. App. 601 (1900).

she represented to the owner to be entitled to the commissions, it was held that the owner's broker could not recover his commissions from either the purchaser or her broker.⁷⁵

It is further held in the same case—*Oppenheimer v. Barnett*, 131 App. Div. 614 (N. Y. 1909)—that where the owner's broker calls the attention of a person to the fact that the property is for sale, that in no way obligates such person to make the purchase through him; on the contrary, such person may go directly to the seller and make the best trade he can with him, or he may purchase through some broker whom he selects himself. In either case, the broker whom the seller had originally employed would have no cause for complaint against the purchaser or against the broker to whom the seller paid the commissions. If the broker is entitled to commissions at all, it is from the seller, and if the broker is the procuring cause of the sale, he must look to him and not to the purchaser. The purchaser of real estate is not obligated to see that a broker employed by the seller gets the commissions to which he claims he is entitled.

In another case where the broker at least opened up negotiations which were concluded in good faith by another broker, the first broker was awarded a recovery of commissions. Here defendant placed certain property in the hands of various agents for sale, and plaintiff, who was one of them, showed the property to a prospective purchaser, who objected to the price, whereupon it was agreed between plaintiff and defendant that the latter should negotiate with the prospective purchaser, and see if terms could not be reached. Defendant tried to obtain an interview with the purchaser, but was unsuccessful, after which the purchaser employed a broker to purchase the property for him, and defendant, without knowledge that the sale was for the benefit of the same purchaser,

⁷⁵ *Oppenheimer v. Barnett*, 131 App. Div. 614 (N. Y. 1909).

contracted to convey the property to the broker's party for a less price. Held, that plaintiff was the procuring cause of such sale, and was entitled to commissions.⁷⁶

§ 130. Consummation of Sale by Principal.

Where the agent is the procuring cause, he is entitled to commissions even though the negotiations were conducted and concluded by the principal in person.⁷⁷

"It is sufficient to entitle a broker to compensation that the sale is effected through his agency as its procuring cause, and if his communications with the purchaser were the cause or means of bringing him and the owner together, and the sale resulted in consequence thereof, the broker is entitled to recover."⁷⁸ In the case of *Lloyd v. Matthews*, 51 N. Y. 124 (1872) just quoted from, it was also held no error for the court to charge that where a buyer goes directly to the owner and shows such familiarity with the terms of sale of the property—the price asked, for instance—as to lead the owner to believe that the purchaser must have acquired his knowledge from some one who knew, it may become the duty of the owner to inquire from the purchaser who gave him his information, in order that the owner may inform himself whether or not the purchaser derived his information from any of the brokers into whose hands the owner had given the property for sale.⁷⁹ And some of the authorities hold that the fact that the owner did not know that the purchaser had been sent to him by his broker is immaterial.⁸⁰

In *Quist v. Goodfellow*, 99 Minn. 509 (1906), it was

⁷⁶ *Schultz v. Zelman*, 111 S. W. 776 (Tex. 1908).

⁷⁷ *Morgan v. Keller*, 194 Mo. 679 (1905).

⁷⁸ *Lloyd v. Matthews*, 51 N. Y. 124 (1872); *Finch v. Betts*, 134 Ill. App. 475 (1907); *Boqua v. Marshall*, 114 S. W. 714 (Ark. 1908); *Goldsmith v. Cox*, 61 S. E. 555 (S. C. 1908). See also §§ 100, 101 *supra* and §§ 240, 241 *infra*.

⁷⁹ See also *Henninger v. Burch*, 90 Minn. 43 (1903).

⁸⁰ See *Colonial Trust Co. v. Pacific Co.*, 158 Fed. 280 (1907), in which the court refers to *Graves v. Bains*, 78 Tex. 92; *Bryan v. Abert*, 3 App. D. C. 180; *Adams v. Decker*, 34 Ill. App. 17; *Kelly v. Stone*, 94 Iowa 316; *Millan v. Porter*, 31 Mo. App. 563; *Tyler v. Parr*, 52 Mo. 249; *Ross v. Muskowitz*, 95 S. W. (Tex. Civ. App.) 86.

said: "Some of the authorities hold that a real estate broker is entitled to his commission where his efforts were in fact the procuring cause of a sale though made by the owner in good faith and in ignorance of his efforts. * * * To entitle the broker to a commission in such case, where there is no exclusive agency, it must appear that the owner knew, or from the circumstances ought to have known, that the broker was instrumental in inducing the purchaser to enter into the contract. Such was the rule laid down in *Catheart v. Bacon*, 47 Minn. 34; 49 N. W. 331, and it is the law in other states.⁸¹ We are aware of the fact that the authorities are somewhat conflicting upon the subject. (19 Cyc. 264.) "

In another case,⁸² it was said: "While the broker must produce, as well as find, a purchaser,⁸³ it is not indispensable that he participate in the negotiations immediately resulting in a sale, or even that the owner know that the purchaser was the broker's customer.⁸⁴ A charge to the effect that, in the absence of the broker, it was the duty of the owner to ascertain from the purchaser who sent him was held correct in *Bickart v. Hoffman*, 46 N. Y. St. Repr. 886. But it was intimated by this court in this department that there might be circumstances in which the fact that the owner was ignorant that the purchaser was the broker's customer would be controlling."⁸⁵

"The fact that the defendant did not know, at the time of making the sale to Shumaker, that the latter had been procured by the plaintiffs is immaterial. The right to a recovery by the plaintiffs depended upon the fact

⁸¹ Citing *Soule v. Deering*, 87 Me. 365; 32 Atl. 998; *Gamble v. Grether*, 108 Mo. 340; 83 S. W. 306; *Tinges v. Moale*, 25 Md. 480; 90 Am. Dec. 73; *Wylie v. Marine*, 61 N. Y. 415.

⁸² *Jungeblut v. Gindra*, 134 App. Div. 203 (N. Y. 1909).

⁸³ Citing *Gerding v. Haskin*, 141 N. Y. 514; *Rae Co. v. Kane*, 121 App. Div. 494.

⁸⁴ Citing *Lloyd v. Matthews*, 51 N. Y. 124; *Sussdorff v. Schmidt*, 55 N. Y. 319; *Wylie v. Marine National Bank*, 61 N. Y. 415.

⁸⁵ Citing *Metcalf v. Gordon*, 86 App. Div. 368.

that they had procured the purchaser, and not upon the knowledge on the part of the defendant of that fact at the time of the sale.”⁸⁶

Where a broker employed to sell lands merely called the attention of a prospective purchaser to the property without notifying his principal and without taking further steps in the matter, he is not entitled to commissions if the owner, five or six months afterwards, sells the land to the customer without knowledge of the broker's negotiations.⁸⁷

Where a broker employed to sell at a specified price procures a proposed purchaser and opens negotiations with him, the fact that the employer, without terminating the agency or the negotiations so commenced, takes it into his own hands and concludes the sale at a lower price, or upon modified terms, does not deprive the broker of his right to commissions.⁸⁸ But where the broker opens negotiations, but fails to bring the customer to the specified terms and abandons the negotiations, the employer may subsequently sell to the same person at the price fixed, without liability for commissions.⁸⁹ Where negotiations are, in good faith, broken off and abandoned, and a sale is finally effected wholly through the influence of another broker, the first broker is not entitled to commissions.⁹⁰ And so when negotiations with a prospective purchaser are broken off and the broker attempts to sell him property of other persons, he is not entitled to commissions when the owner, a month afterwards, sells to the proposed purchaser on different terms.⁹¹

A contract employing a broker to sell lands, and giv-

⁸⁶ *Millan v. Porter*, 31 Mo. App. 576 (1888), (citing *Tyler v. Parr*, 52 Mo. 250; *Goffe v. Gibson*, 18 Mo. App. 4).

⁸⁷ *Waters & Son v. Rafalsky*, 134 App. Div. 870 (N. Y. 1909).

⁸⁸ *Hobbs v. Edgar*, 23 Misc. 618 (N. Y. 1898); *Wright v. McClintock*, 136 Ill. App. 442 (1907); *Phinizy v. Bush*, 129 Ga. 486 (1907); *Morris v. Francis*, 75 Kans. 580 (1907); s. c., 89 Pac. 901; *Cook v. Forst*, 116 Ala. 396 (1896).

⁸⁹ *Markus v. Kenneally*, 43 N. Y. Suppl. 1056 (1897).

⁹⁰ *Walker v. Baldwin*, 106 Md. 632 (1907).

⁹¹ *Miller v. Vining*, 112 App. Div. 304 (N. Y. 1906).

ing him commissions "in case of the sale or conveyance of said property at any time within one year from this date," should not be construed to mean that the broker was entitled to commissions if the property were sold by the owner without the aid of the broker, but, on the contrary, only entitles the broker to commissions if he was instrumental in bringing the owner and purchaser together.⁹² And where a broker voluntarily interposes in a transaction between the principals, but even then fails to bring the purchaser up to the terms of the seller, he is not entitled to a commission when the principals later get together in continuation of the negotiations and come to an agreement.⁹³

⁹² *Parkhurst v. Tryon*, 134 App. Div. 843 (N. Y. 1909). See also subject of exclusive agency in §§ 99 *supra* and 239 *infra*.

⁹³ *Willard v. Ferguson*, 125 App. Div. 868 (N. Y. 1908). See also *Kiernan v. Bloom*, 91 App. Div. 429 (N. Y. 1904), quoted *supra* § 96.

CHAPTER XII.

SALE MUST BE ON EMPLOYER'S TERMS.

§ 131. General Statement.

The broker must produce a purchaser ready, willing and able to purchase on the principal's terms. (§§ 132, 133.) But if he does not accomplish the precise thing which he was employed to do, but what he does accomplish is accepted by the principal, the broker is entitled to a commission. (§§ 134, 135.)

If a price is fixed, the broker must procure a purchaser at that price; but the price may be increased by the principal on timely notice to the broker. (§§ 136, 137.)

The broker must procure a purchaser during the term of his employment, and where no definite time is fixed he has a reasonable time. (§ 138.)

The broker is not obligated to make a sale unless he expressly contracts to do so. (§ 139.)

§ 132. Purchaser Must Agree to Seller's Terms.

Whatever may be the terms and conditions upon which the broker's right to compensation depends, they must be performed as a condition precedent to a right of action for a commission.¹ Where the terms of the sale are all given to the broker in advance, he must produce a purchaser ready, willing and able to purchase on those terms, and the owner may refuse any proposed pur-

¹ *Fraser v. Wyckoff*, 63 N. Y. 445 (1875); *Monson v. Kill*, 144 Ill. 255 (1893); *Jepsen v. Marohn*, 119 N. W. 988 (S. D. 1909); *Crosthwaite v. Lebus*, 146 Ala. 525 (1906). As to variation of terms by owner, see §§ 134, 135 *infra*.

chaser who is not willing to purchase on all of those terms.²

On the other hand, if the broker produces a person ready, willing and able³ to purchase on the terms prescribed by the principal, the latter may not impose new or different terms.⁴ A change of terms comes too late after the broker has negotiated a sale.⁵ A broker who has procured a purchaser for lands to whom the defendant gave a written receipt for earnest money paid, stating all the terms of the sale, but providing for the execution of a formal contract, is entitled to recover his commissions although the sale was not consummated by reason of the fact that the vendor subsequently, at the time fixed for signing the contract, insisted that the purchaser pay accumulated taxes in addition to the price agreed upon.⁶

If no terms are laid down beforehand by the principal, the broker takes the hazard. In such case the broker cannot recover commissions unless he produces a purchaser ready, willing and able to purchase on the terms, whatever they may be, then stated by the principal.⁷

§ 133. All of Seller's Terms Must be Met.

All the terms must be agreed upon. "The particular terms of the contract must be complied with * * * and no performance upon other terms will suffice, unless accepted by the principal. * * * The purchaser found by the broker must be not only ready, willing and able to purchase, but to purchase upon the terms specified in the contract of employment." ⁸

² Smith v. Allen, 101 Iowa 608 (1897).

³ See §§ 117-119 *supra*.

⁴ Milne v. Ingersoll Co., 120 App. Div. 465 (N. Y. 1907). See also §§ 134, 135, 147 *infra*.

⁵ Com. & Inv. Co. v. Real Estate Co., 120 Mo. App. 437 (1906).

⁶ Phillips v. Kraft, 136 App. Div. 859 (N. Y. 1910).

⁷ See § 147 *infra*.

⁸ Newton v. Conness, 106 S. W. 894 (Tex. 1908); Wolber v. Chambers, 128 Ill. App. 624 (1906).

Where the broker produces a proposed purchaser who enters into a writing in which some of the terms are agreed upon, but others are left to be agreed upon in the contract of sale, the broker is not entitled to commission if the parties are unable to agree on these other matters.⁹

Where a broker is employed to sell a whole parcel of land, but produced purchasers for only two portions, and after the lapse of a reasonable time, the owner, independently of the broker, sold the two portions to the purchasers the broker had found, the broker is not entitled to commission on the two portions sold. Before the broker can recover on such a contract he must show performance of the entire contract.¹⁰

If the purchaser insists upon more onerous terms in the contract than those which were verbally agreed upon between the parties, the owner is not bound to execute such a contract, and under such circumstances the broker does not produce a purchaser willing to execute a contract upon the terms prescribed.¹¹ And so where the broker's purchaser refused to consummate the purchase unless the vendor would agree to give him a warranty deed, which the vendor refused to do, and the parties could not agree as to the form of the deed, the broker is not entitled to commissions. This was the case in *Garcelon v. Tibbets*, 84 Me. 148 (1891), in which the court said: "The efforts of the plaintiff to complete the sale failed, not through any fault of the defendant, but by reason of the purchaser and the defendant not being able to agree in reference to the form of conveyance. The purchaser demanded more than the law exacts where there is no agreement, and no form of conveyance is agreed upon. The title was in the defendant. A deed of release or quit claim of the usual form would have conveyed the defendant's title and es-

⁹ *Shapiro v. Nadler*, 51 Misc. 13 (N. Y. 1906). See *Mainhart v. Poerschke*, 32 Misc. 97 (N. Y. 1900), where the time of closing title had not been agreed upon.

¹⁰ *Carpenter v. Atlas Imp. Co.*, 123 App. Div. 706 (N. Y. 1908). But see § 134 *infra*.

¹¹ *Weiss v. Robinson*, 112 App. Div. 276 (N. Y. 1906).

tate as effectually as a deed of warranty. R. S., Chap. 73, § 14. An agreement or covenant to convey a good title does not necessarily entitle the covenantee to a warranty deed. *Kyle v. Kavanagh*, 103 Mass. 356, 359."¹²

The broker cannot even call upon his principal to go to the place of business of the other party and there make the contract or negotiate for its terms.¹³

§ 134. Acceptance by Owner of Different Terms.

Where the broker does not accomplish the precise thing which he was employed to do, but what he did is accepted by the owner as being satisfactory, the broker is entitled to commission.¹⁴

If the broker negotiates a contract different from that prescribed by his employer and the employer subsequently ratifies it, and thus a contract is finally made which is satisfactory to him, then the broker has earned his commission.¹⁵ This applies where the broker has acted in good faith, and the contract made is either signed by the employer himself or is approved or ratified by him.¹⁶ It has been said, however, that "the mere approval of the contract made by the broker where it is substantially different from the contract he was employed to make, cannot of itself be held to be an acceptance by the owner as performance of the broker's obligation."¹⁷

¹² Also citing *Gazley v. Price*, 16 Johns. 267; *Ketchum v. Evertson*, 13 Johns 359; *Potter v. Tuttle*, 22 Conn. 512. See also § 160 *infra*.

¹³ *Logan v. McMullen*, 87 Pac. 286 (Cal. 1906).

¹⁴ *Davis v. Weber*, 46 Misc. 591 (N. Y. 1905); *Curry v. Fetter*, 15 Ky. Law Rep. 494 (1893); *Hoadley v. Savings Bank*, 44 L. R. A. 350 (1899); *Davis v. Gassette*, 30 Ill. App. 44, 45 (1888); *McFarland v. Lillard*, 2 Ind. App. 167 (1891); *Reid v. McNerney*, 128 Iowa 350 (1905), (citing *Welch v. Young*, 79 N. W. 59; *Gretber v. McCormick*, 79 Mo. App. 325; *Henry v. Stewart*, 85 Ill. App. 170; *Hubachek v. Hazard*, 83 Minn. 437; 86 N. W. 426; *Hafner v. Herron*, 165 Ill. 242; 46 N. E. 211).

¹⁵ *Lapsley v. Holridge*, 71 Ill. App. 652 (1897); *Snyder v. Fearer*, 87 Ill. App. 275 (1899); *Levy v. Wolf*, 84 Pac. 313 (Cal. 1905), (citing *Gelatt v. Ridge*, 117 Mo. 553; 23 S. W. 882; *Jones v. Adler*, 34 Md. 440).

¹⁶ *Gilder v. Davis*, 137 N. Y. 506 (1893).

¹⁷ *Reiger v. Bigger*, 29 Mo. App. 425 (1888).

§ 135. Broker's Commission, if He is "Procuring Cause," Not Affected by Variation of Terms.

It is not essential to entitle a real estate broker to commissions, that he should have procured a purchaser upon the precise terms first named by the principal at the time of employment; for if, through the instrumentality of the broker, the buyer and seller meet, and negotiations are thus opened up between them, which, continuing without withdrawal of either party therefrom, culminate in a sale, though for a less sum than originally demanded, the broker is entitled to his commissions.¹⁸ Where the parties are brought into communication through the broker's agency, the principal by negotiating with the purchaser on different terms, waives the terms given to the broker.¹⁹

"The principal possesses an undoubted right to adhere to the price and terms originally fixed, but if he deviates therefrom and consents to a modification thereof, and thereupon concludes the sale with the person procured by the broker, he ratifies the latter's departure from his instructions and is liable for the commission."²⁰

If the broker is the procuring cause, although the owner makes the sale at a less sum than the broker was authorized to sell for, he is liable to the broker for commissions, and if not for the full sum agreed upon, at least for compensation for the reasonable value of his services.²¹

§ 136. Requirements as to Price.

If a price is fixed, the broker must procure a purchaser at that price.²² And where the broker produces

¹⁸ *Lobbs v. Edgar*, 23 Misc. 618 (N. Y. 1898); *Jones v. Henry*, 15 Misc. 152 (N. Y. 1895), (citing *Levy v. Coogan*, 16 Daly 137 (N. Y. 1890); *Gold v. Serrell*, 6 Misc. 124 (N. Y. 1893)).

¹⁹ *Davis v. Gassette*, 30 Ill. App. 44, 45 (1888).

²⁰ *Jones v. Henry*, *supra*; *Hafner v. Herron*, 165 Ill. 246, 247 (1897); *Huntmer v. Arent*, 16 S. D. 465 (1903).

²¹ *Hancock v. Stacy*, 116 S. W. 177 (Tex. 1909).

²² See *Howell v. Denton*, 68 S. W. 1002 (Tex. 1902).

a purchaser at the price asked by the owner, the latter cannot then impose new conditions.²³ Where nothing is said, the presumption is that the sale is to be for all cash.²⁴

Where it is agreed that the broker shall have commissions if he furnishes a purchaser at a fixed price, he is not entitled to compensation under the agreement for furnishing a purchaser at a less price.²⁵ In such a case, it has been said that the broker cannot recover proportionate commissions on the lesser sum, or what his services were reasonably worth, when he did not declare on a *quantum meruit*.²⁶ But it has been held, however, that if one sues to recover compensation which is fixed in amount by agreement, he may recover upon *quantum meruit* if he fails to establish his alleged agreement. The matter is one of pleading and proof and further comment would carry the discussion too far from the present subject.

While the price is almost always fixed by the seller, yet if no price is fixed, it has been said, though perhaps incorrectly, that the broker would probably have the power to fix the price,²⁷ but it is quite settled that where no price is fixed, the broker takes the hazard of producing a purchaser willing to purchase at a price satisfactory to the seller.²⁸ A real estate broker has no authority to fix the price.²⁹ Evidence of the entry of the price asked, made in the broker's books in the presence of the principal, is admissible as part of the *res gestæ*.³⁰

§ 137. Increase of Price by Owner.

Where an owner places property in the hands of a

²³ *McQuillen v. Carpenter*, 72 App. Div. 595 (N. Y. 1902).

²⁴ *Emery v. Atlanta Exch.*, 88 Ga. 325 (1891).

²⁵ *Cook v. Forst*, 116 Ala. 396 (1896).

²⁶ *Steinfeld v. Storm*, 31 Misc. 167 (N. Y. 1900).

²⁷ *Law of Contracts, Special Topics*, West Pub. Co. (1896), Topic "Brokers," p. 9.

²⁸ See §§ 138, 147 *infra*.

²⁹ *Kilhan v. Wilson*, 112 Fed. 569 (1902).

³⁰ *Monroe v. Snow*, 131 Ill. 132 (1890).

broker and fixes a price, he has the right subsequently to increase the selling price, but until notice is given to the broker of the change in the price, he is justified in continuing his efforts for a sale at the price first fixed and is entitled to his commission whenever he obtains a purchaser who is willing to take the property on the terms which his principal prescribed.³¹

§ 138. Time of Performance.

The broker must procure a purchaser during the term of his employment. Where no definite time is fixed the broker has a reasonable time in which to effect a sale.³² What is a reasonable time when the facts are undisputed and different inferences cannot reasonably be drawn from the same facts, is a question of law.³³

A broker employed to sell land within a specified time, is entitled to his commission where he procures within such time a purchaser who is willing to buy, and communicates such fact to the owner; and the latter cannot, by deferring the time of meeting with such purchaser until after the expiration of the agent's term of employment, defeat his right.³⁴ And where the broker is limited in time, and the principal and the proposed purchaser found by the broker, by mutual consent, delay the consummation of the transaction until after the expiration of the broker's time limit, the broker is entitled to commissions.³⁵

And it has been held that the broker is entitled to compensation even though he did not bring the parties to terms within the time limited by the principal, but about a week or more thereafter.³⁶ And so, where brokers are

³¹ *Van Stelen v. Herbst*, 30 App. Div. 255 (N. Y. 1898).

³² *Donovan v. Weed*, 182 N. Y. 43 (1905); *Rand v. Cronkrite*, 64 Ill. App. 224 (1896). See also §§ 82-86 *supra*.

³³ *Wright v. Bank of Metropolis*, 110 N. Y. 237 (1888).

³⁴ *Vanderveer v. Suydam*, 83 Hun 116 (N. Y. 1894); *aff'd*, 151 N. Y. 673 (1896) on opinion below; *Levy v. Wolf*, 84 Pac. 315 (Cal. 1905).

³⁵ *Humphries v. Smith*, 5 Ga. App. 342 (1908).

³⁶ *Griswold v. Pierce*, 86 Ill. App. 406 (1899).

employed to purchase property, a delay of two years for the purpose of curing the title will not defeat the recovery of commissions if a deed is finally accepted by the purchaser and the steps of the transaction are connected.³⁷

“Where the owner of property employs a broker to bring him an offer for the purchase of it without naming a price at which he is willing to sell,—that is to say, where the owner of property employs a broker to bring him an offer which he is to pass upon after it is brought to him,—there can be no implied agreement or understanding that the broker is to be entitled to a reasonable time in which to procure such an offer; in such a case, the owner has a right to reject every offer brought to him, as was held in *Walker v. Tirrell*, 101 Mass. 257; and it is plain that under those circumstances he could decide not to accept any offer and dismiss the broker altogether.”³⁸

§ 139. Liability of Broker for Failure to Sell.

“The broker’s engagement is to use his efforts to find a purchaser while his employment as broker endures, but he does not agree to find a purchaser within any specified time, or at all.”³⁹ “If, while still employed, he finds one at the seller’s terms, he is entitled to his commissions, but the question of the reasonableness of the time which he has taken does not affect the performance of any contract upon his part. The lapse of time between the day of employment and the production of a purchaser may have a bearing upon the duration of the employment itself, since an unreasonable delay may import an abandonment upon the broker’s part, upon which

³⁷ *Michaels v. Gabren*, 9 App. Div. 495 (N. Y. 1896). See also § 139 *infra*.

³⁸ *Cadigan v. Crabtree*, 179 Mass. 480 (1901); s. c. on further appeal, 186 Mass. 7 (1904).

³⁹ *Moore v. Boehm*, 45 Misc. 622 (N. Y. 1904); *Attix v. Pelan*, 5 Iowa 341, 342 (1857); *Glover v. Henderson*, 120 Mo. 379 (1893).

the principal may rely, or would justify the principal's termination of the employment, as against an imputation of bad faith; an abandonment, however, equally with an express termination of the employment, is matter of defense and has not to be negatived by the plaintiff in the course of his proof to support a cause of action for commissions. * * * As we have indicated, the broker does not sue upon his performance of his own promise to find a purchaser (thus importing performance within a reasonable time as an element of his own case); the promise is wholly the principal's and the broker avails himself of it with the hope of the reward thus held out for his successful efforts. But the promise is for a reasonable time, and, if the broker's success is delayed unreasonably, he may be met with the assertion that the time has run."⁴⁰

But if the broker expressly contracts to sell property within a specified time for a specified amount, he may be liable for failure to do so.⁴¹

⁴⁰ Moore v. Boehm, 45 Misc. 622 (N. Y. 1904). In Young v. Ruhwedel, 119 Mo. App. 241 (1906), it is said that the consideration is the agreement of the broker to perform the services required by the terms of the employment.

⁴¹ Dunn v. Mackey, 80 Cal. 104, 107 (1889).

CHAPTER XIII.

BROKER MUST ACT IN GOOD FAITH.

§ 140. General Statement.

The broker must act in good faith. (§ 141.) He may forfeit his standing,—

(1) By accepting pay from or acting for the other party. (§ 142.)

(2) By himself becoming a principal in the transaction. (§ 143.)

(3) By not accepting the best terms he was able to secure. (§ 144.)

An agent cannot legally make any profit out of transactions carried on by him for his principal, except the reward or commission agreed upon or implied by law. (§§ 142, 143.)

Circumstances may exist under which a refusal on the part of the agent to disclose information asked for, would not imply bad faith. (§ 145.)

§ 141. Good Faith.

“Like other agents, the broker is required to exercise the utmost good faith towards his principal; and if, in the course of his agency, he has committed a fraud on his principal, he is not entitled to his commissions.”¹ If the broker acts in bad faith, the principal may discharge him and complete the transaction himself with-

¹ 4 Am. & Eng. Ency. of Law (2nd Ed.), 971, quoted in *Low v. Woodbury*, 107 App. Div. 298 (N. Y. 1905), where is also cited *Martin v. Bliss*, 57 Hun 157 (N. Y. 1890); *Whaples v. Fahys*, 87 App. Div. 518 (N. Y. 1903); *Murray v. Beard*, 102 N. Y. 505 (1886). See also *Hafner v. Herron*, 165 Ill. 247 (1897); *Jeffries v. Robbins*, 66 Kans. 437 (1903); *Veasey v. Carson*, 177 Mass. 117 (1900).

out liability for commissions.² “There is a want of good faith on the part of the agent towards his principal, when he acts adversely to his principal’s interest, or where, representing the seller, he conceals from him an arrangement intended for the advantage of the buyer.³ In the application of this rule it makes no difference whether the result of the agent’s conduct is injurious to the principal or not; in such case, the misconduct of the agent affects the contract from considerations of public policy rather than of injury to the principal. ‘It matters not, that there was no fraud meant, and no injury done. The rule is not intended to be remedial of actual wrong, but preventive of the possibility of it.’ *Young v. Hughes*, 32 N. J. Eq. 372.”⁴

The broker is not required, in support of his cause of action, affirmatively to establish his good faith. That he did not act in good faith is matter of defense.⁵

§ 142. Accepting Pay from or Acting for Other Party to the Transaction.

A broker with discretion cannot recover commissions if he is acting for both parties, unless with their knowledge and consent.⁶ Some cases go to the length of holding that the broker may not accept part of the commission of the broker acting for the other party.⁷

§ 143. Broker as a Principal in the Transaction, or Making a Profit Therefrom Other Than His Commissions.

Real estate brokers purchasing real estate as agents for an undisclosed principal cannot recover commissions

² *Featherston v. Trone*, 102 S. W. 198 (Ark. 1907).

³ Citing Story on Agency, § 334; *Pratt v. Patterson's Exrs.*, 112 Pa. St. 475; *Prescott v. White*, 18 Ill. App. 322.

⁴ *Hafner v. Herron*, 165 Ill. 247 (1897).

⁵ *Pollatschek v. Goodwin*, 17 Misc. 591 (N. Y. 1896); *Colonial Tr. Co. v. Pacific Co.*, 158 Fed. 284 (1907); *Cook v. Platt*, 104 S. W. 1133; 126 Mo. App. 553 (1907).

⁶ See §§ 47-58 *supra* for fuller discussion of broker acting for both parties.

⁷ See *Plotner v. Chillson*, 95 Pac. 777 (1908), (citing *McKinley v. Williams*, 74 Fed. 95; 20 C. C. A. 313).

of the vendors for effecting the sale.⁸ In *Hess v. Gallagher*, 64 Misc. 95, 96 (N.Y. 1909), it was said: "As agents for the defendant, the plaintiffs might not directly buy from or sell to the defendant and recover for services upon their own contract as his agents; because, as agents, they were and would be under legal obligation to respect the confidence reposed in them as such, and could not unite, Jekyll and Hyde like, in their same persons the character of principal, which would naturally tend to a violation of the confidence reposed in them as agents and by whose active instrumentality an acceptance of defendant's offer was effected, if at all; and, therefore, they would and did disentitle themselves to recover for services therein, because 'contracts which are opposed to open, upright and fair dealing are opposed to public policy. A contract by which one is placed under a direct inducement to violate the confidence reposed in him by another is of this character.' "

§ 144. Broker Must Accept Largest Offer.

An agent to sell stands in the place of and represents the vendor and is therefore bound to discard every feeling of friendship toward a proposed buyer, to know no self-interest, to act, as in his judgment the interests of the vendor would induce the vendor to act, if present in person instead of being present by an agent. It is his duty, of two offers, to accept the one which would most benefit his client.⁹ "In commenting on the relation of real estate brokers to their principals it was said in *Rich v. Black et al.*, 173 Pa. 92, 99, that 'the relation which such agents bear is confidential and disarms the vigilance of their principals; it affords peculiar facilities for obtaining exclusive information in respect of the property entrusted to them for sale; their employment implies

⁸ See §§ 59-71 *supra*, 151, 152 *infra*.

⁹ Dictum in *Haydock v. Stow*, 40 N. Y. 369 (1869), citing authorities. See also *Plotner v. Chillson*, 95 Pac. 776 (Okla. 1908); *Bunn v. Keach*, 214 Ill. 264 (1905).

that they have superior advantages for making sales and that they will use every effort and means to obtain the highest price for the benefit of their principal.' See also *Addison v. Wanamaker*, 185 Pa. 536." ¹⁰

" If, after receiving instructions to sell property on certain specified terms, the agent learns that other and more advantageous terms can be obtained, it is his plain duty and he is under every legal and moral obligation to communicate the facts to the principal, that he may act advisedly in the premises." ¹¹ Thus where a broker was authorized to sell for \$105,000 or more, and he procured a purchaser at \$105,000 when he might have procured a purchaser at \$110,000, he is not entitled to recover commissions. ¹²

Where the brokers secure a purchaser at the price asked by the seller, but, fraudulently concealing the fact that the purchaser has acceded to the terms, endeavor to beat the vendor down on the price, they cannot be said to have acted in good faith. And so it was held, even in a case where the broker finally submitted the offer originally asked for and the owner apparently accepted it but later refused to sign the contract. ¹³ And where the broker retains part of the price he obtains, he is guilty of fraud and forfeits his commission. ¹⁴

And while it may be bad faith for the broker to endeavor to get his client to pay more for the property than is really asked by the owner, yet that would not apply with the same strictness to an exchange in which the broker is acting for both parties with their knowledge, and he endeavors to have one party pay or allow more for the property he is to take in order to equalize the equities and thus bring about an exchange. ¹⁵

¹⁰ *Wilkinson v. McCullough*, 196 Pa. St. 208, 209 (1900).

¹¹ *Holmes v. Cathcart*, 60 L. R. A. 734 (Minn. 1903).

¹² *Lichtenstein v. Case*, 99 App. Div. 570 (N. Y. 1904).

¹³ *Martin v. Bliss*, 57 Hun 157 (N. Y. 1890).

¹⁴ *Deter v. Jackson*, 76 Kans. 568 (1907). See §§ 145, 250 *infra*.

¹⁵ *Featherston v. Trone*, 102 S. W. 197 (Ark. 1907).

§ 145. When Refusal to Disclose Information is Not Bad Faith.

Where an owner of land agrees to pay another person as compensation for securing a purchaser for the land, all above a minimum sum per acre and a fixed sum in addition, and such person sells the land for an amount above the minimum, the fact that he refuses to tell the owner for how much he sold the land, or states to him that he sold it at the minimum, will not deprive him of his right to recover the additional fixed sum agreed upon. In such a case there is no such relation of trust and confidence between the parties as will require a disclosure to the owner of the terms of the sale. There is no principle of law that obliges one who has made an honest contract with another, to communicate to that other anything subsequently happening that might be an inducement to that other to repudiate his contract.¹⁶

¹⁶ *Fulton v. Walters*, 216 Pa. St. 56 (1906).

CHAPTER XIV.

AVAILABILITY OF PURCHASER.

§ 146. General Statement.

The broker must produce a purchaser who is ready, willing and able to purchase on the seller's terms. (§§ 147, 148.) To procure a party who merely takes an option does not entitle the broker to commission. (§ 149.) But having produced a purchaser ready, willing and able to purchase, the broker cannot be deprived of his commissions by a subsequent change of mind on the part of the seller. (§ 150.)

The principal has the right to demand to know who the purchaser is; but may waive this right. (§§ 151, 152.)

The proposed purchaser must not only be ready and willing, but also able to purchase on the terms of the seller. But the seller cannot avail himself of the objection that the customer is not financially able, after he has accepted the purchaser as satisfactory and has entered into an enforceable contract with him. (§§ 153-155.)

§ 147. Ready and Willing to Purchase.

The broker must produce a purchaser ready, willing and able¹ to purchase on the seller's terms.² The minds of the seller and purchaser must be brought to meet, through the broker's agency.³ And it should always be

¹ As to ability of purchaser, see §§ 153-155 *infra*.

² Nolan v. East, 132 Ill. App. 634 (1907); King Powder Co. v. Dillon, 96 Pac. 441 (Colo. 1908); Cook v. Forst, 116 Ala. 397 (1896).

³ Bunyon v. Wilkinson, 57 N. J. L. 422 (1894).

borne in mind that some authorities hold that the broker is not entitled to commissions until he has procured an executed contract.⁴

If the seller lays down his terms to the broker beforehand, and the broker produces a purchaser ready and willing to purchase on the terms laid down, the commissions are earned.⁵ If, on the other hand, no terms have been laid down, then the purchaser produced by the broker must be ready and willing to purchase on the terms exacted by the seller.⁶

§ 148. Purchaser Not Ready and Willing.

The requirements of authorization to find a purchaser are not complied with by producing a person willing to take a lease for a long term with the privilege of purchasing.⁷ Where no statement is made to the broker that the property is free and clear, and the only terms laid down by the owner are that he would sell at a satisfactory figure, the broker is not entitled to commissions for producing a proposed purchaser at a figure satisfactory to the owner, if the proposed purchaser, learning that there are restrictions on the property, refuses to pay the owner's price and offers a smaller amount.⁸ If the proposed purchaser capriciously or unjustifiably refuses to contract, he cannot be regarded as a ready and willing purchaser.⁹

Where one whose attention was called by the owner's broker to the fact that certain property was for sale, refused to make such broker an offer and immediately afterwards bought the property through another broker, whom she represented to the owner to be entitled to the

⁴ See §§ 117-119 *supra*.

⁵ *Forrester v. Price*, 6 Misc. 308 (N. Y. 1893). See § 150.

⁶ *Forrester v. Price*, *supra*; *Fairchild v. Cunningham*, 84 Minn. 524 (1901); *Runyon v. Wilkinson*, 57 N. J. L. 421 (1894).

⁷ *Woolley v. Schmal*, 5 Ohio Cir. Ct. 76 (1890).

⁸ *Weibler v. Cook*, 77 App. Div. 637 (N. Y. 1902).

⁹ *Shelnhouse v. Klueppel*, 80 App. Div. 445 (N. Y. 1903).

commissions, the owner's broker has not produced a purchaser, ready and willing, and cannot recover his commissions, either from the purchaser or her broker.¹⁰

Where the broker presents a person who assumes to represent an organization desiring to purchase, and such person is unable to produce his authority for entering into a contract on behalf of the organization, and refuses to enter into the contract personally, it was held in *Kirwan v. Barney*, 29 Misc. 614 (N. Y. 1899) that the owner is not liable for commissions. In the case cited, the court quotes from *Bennett v. Egan*, 3 Misc. 421 (N. Y. 1893), as follows: "As long as the vendor insists upon something he has a right to insist upon as a condition of sale, and to which the vendee refuses to assent, in consequence of which disagreement the vendee refuses to enter into an enforceable contract of sale, it cannot be held that the broker has procured a complete meeting of the minds of the vendor and vendee."

If the purchaser insists upon more onerous terms in the contract than those which were verbally agreed upon between the parties, the owner is not bound to execute such a contract, and under such circumstances the broker does not produce a purchaser willing to execute a contract upon the terms prescribed.¹¹

Where a broker produced a proposed purchaser and an informal writing was entered into, according to which the parties were to meet subsequently and execute a written contract of sale, it was held in *Feiner v. Kobbe*, 13 Misc. 499 (N. Y. 1895) that the broker is not entitled to commissions if the purchaser fails to attend and execute the written contract. This, on the ground that the purchaser was apparently not ready and willing to purchase the property.

In the case cited, however, the court concluded its

¹⁰ *Oppenheimer v. Barnett*, 131 App. Div. 614 (N. Y. 1909).

¹¹ *Weiss v. Robinson*, 112 App. Div. 276 (N. Y. 1906).

opinion as follows: "The defendant insisted upon having a formal contract in writing giving in detail all the terms and conditions of the exchange, and had a right to impose this condition before assenting to a trade, or making himself liable for brokerage. The failure to effect the exchange is not chargeable to any misconduct of the defendant, but is owing to inexcusable absence of Newborg, the proposed purchaser, whom the plaintiff impliedly undertook to produce at the time and place appointed for the execution of the formal contract."

§ 149. Procuring Person who Takes Option.

A broker is not entitled to a commission for procuring a party who enters into an option which gives him the right to purchase but does not obligate him to do so, even though a deposit is paid on such option.¹² And so, if the broker merely produces a person who, without himself agreeing to buy, obtains a written agreement from the owner to sell and afterwards refuses to take title, this does not entitle the broker to commissions.¹³

If the purchaser enters into a contract which, as one of its conditions, reserves to him the privilege of annulling the contract under certain contingencies, there is no completed transaction.¹⁴ Where the proposed purchaser insists on a clause in the contract that in case he rejects title on account of encroachments, which would not otherwise constitute ground of rejection, his deposit shall be returned, the broker is not entitled to commissions, as the contract is thus rendered a mere option.¹⁵

If the broker is employed by a prospective purchaser

¹² *Millstein v. Doring*, 102 App. Div. 349 (N. Y. 1905); *Runck v. Dimmick*, 111 S. W. 779 (Tex. 1908); *Wilson v. Ellis*, 106 S. W. 1152 (Tex. 1908); *Block v. Ryan*, 4 App. Cas. D. C. 283 (1894). See also *Lawrence v. Rhodes*, 188 Ill. 100 (1900), where are cited *Aigler v. Carpenter Co.*, 51 Kans. 718; *Kimberley v. Henderson*, 29 Md. 512; *Zeidler v. Walker*, 41 Mo. App. 118; *Dwyer v. Raborn*, 6 Wash. 213. And see §§ 163, 351 *infra*.

¹³ *Kampf v. Dreyer*, 119 App. Div. 134 (N. Y. 1907); *Runck v. Dimmick*, *supra*.

¹⁴ *Crockett v. Grayson*, 98 Va. 354 (1900). See also Ch. XV, "Transaction Must be Complete."

¹⁵ *Hough v. Baldwin*, 53 Misc. 284 (N. Y. 1907).

to obtain an option, the above rule does not, of course, apply, and the broker is entitled to compensation for his services if he accomplishes the object of his employment.¹⁶

§ 150. Change of Mind by Vendor.

Wilful, arbitrary, capricious or fraudulent refusal of the vendor to sell when a purchaser is produced, does not deprive the broker of his right to commissions.¹⁷ "The production of a responsible purchaser on terms which are satisfactory to the employer at the time the contract of brokerage is entered into, is sufficient to entitle the broker to his commissions, and he cannot be deprived of his right to them by a mere change of mind on the part of the vendor."¹⁸

But where there is no time fixed, the vendor, before his proposition is accepted, may change his mind and withdraw his proposition if he does it in good faith.¹⁹

§ 151. Disclosure of Purchaser.

The broker must produce the purchaser to his principal. The principal is entitled to know who the proposed purchaser is and with whom he is expected to enter into a contract, and as long as there is uncertainty as to the purchaser the broker cannot claim performance of his contract and demand his compensation.²⁰ But it is held in *Young v. Ruhwedel*, 119 Mo. App. 242 (1906) that the production by the broker of a contract of purchase signed by the purchaser is legally equivalent to the production of the purchaser himself.

The true identity of the purchaser may be sometimes

¹⁶ See *Boardman v. Hanks*, 185 Mass. 555 (1904).

¹⁷ *Flower v. Davidson*, 44 Minn. 48 (1890).

¹⁸ *Martin v. Werman*, 107 App. Div. 482 (N. Y. 1905). See also *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378 (1880); *Hancock v. Stacy*, 116 S. W. 177 (Tex. 1909).

¹⁹ *Arthur v. Porter*, 118 S. W. 611 (Tex. 1909). See also "Time of Performance,"

§ 138 *supra*.

²⁰ *Gerding v. Haskin*, 141 N. Y. 514 (1894).

a material fact which ought to be known to the principal, since such knowledge might affect his action.²¹ "Obviously a broker cannot keep his customer in the dark and allow him (the principal) to fall into the trap of agreeing to pay another broker, or of taking a less price for the property in the belief that no commissions are to be paid, and then recover his commission."²²

Where the broker misleads his principal and gives him a false name as that of the prospective buyer, the principal is not liable to the broker for commission if he sells, either directly or through another broker to the very customer who was in fact the customer of the broker, but whose real identity was concealed.²³

§ 152. Waiver of Right to Disclosure of Purchaser.

But while the seller is entitled to know who the proposed purchaser is, and with whom he is expected to enter into contract, he may relinquish that right by waiving the production of the intending purchaser and the consequent information.²⁴ Thus where the principal does not ask for it, the broker need not disclose the name of his customer.²⁵ And where the broker has not disclosed the name of the proposed buyer, and the seller interposes no objection thereto, but refuses to make the sale after the broker notifies him that a purchaser has been procured, he (the seller) waives the right to the defense that the broker is not entitled to commissions because he did not communicate the name of the proposed purchaser.²⁶

On the other hand, "an agent cannot be deprived of his commission merely because the actual purchaser

²¹ *Veasey v. Carson*, 177 Mass. 117 (1900), (citing *Young v. Hughes*, 32 N. J. Eq. 372; *Pratt v. Patterson*, 112 Penn. St. 475).

²² *Jungeblut v. Gindra*, 134 App. Div. 293, 294 (N. Y. 1909).

²³ *Id.*

²⁴ *Simpson v. Smith*, 36 Misc. 815 (N. Y. 1902).

²⁵ *Hovey v. Aaron*, 133 Mo. App. 583 (1908).

²⁶ *Duclos v. Cunningham*, 102 N. Y. 678 (1886).

takes title in another's name." ²⁷ The deed to the purchaser is admissible in evidence to show who the purchaser really was. ²⁸

§ 153. Financial Ability of Purchaser.

The rule requires that the proposed purchaser must not only be ready and willing, but also able to purchase, on the seller's terms. ²⁹ By this is meant that the proposed purchaser must be financially able to make the purchase. Where no contract results, in order to recover, the broker must show the financial ability of the proposed purchaser. ³⁰

In *Iselin v. Griffith*, 62 Iowa 668 (1883), the owner sold the land to another after notice of a sale made by the broker. The court said: "We think that, in order to entitle plaintiffs to recover, something more than a mere offer to purchase should be shown by them. Such an offer could be made by one without means, and who is in no condition to comply with the terms of the sale, and against whom a claim for damages resulting from a failure to perform the contract of purchase, could not be enforced. An offer from such an one ought not to be considered as constituting the performance of plaintiffs' undertaking to negotiate the sale of the land. As the pecuniary responsibility of the purchasers was or ought to have been known to plaintiffs, and as upon it depended the performance of their contract with defendant, the burden rested upon them to show it. These conclusions are supported by *Coleman's Exrs. v. Mead*, 13 Bush. 358, and *McGavock v. Woodlief*, 20 How. 221. Contra see *Cook v. Kroemeke*, 4 Daly 268, and *Hart v. Hoffman*, 44 How. Pr. 168."

²⁷ *Konner v. Anderson*, 32 Misc. 511 (N. Y. 1900), (citing *Randrup v. Schroeder*, 22 Misc. 367 (N. Y. 1898)).

²⁸ *Myers v. Cohen*, 4 Misc. 185 (N. Y. 1893).

²⁹ *Lunney v. Healey*, 44 L. R. A. 619 (1898).

³⁰ *Corbin v. M. & T. Bank*, 121 App. Div. 744 (N. Y. 1907). But see *McDermott v. Mahoney*, 115 S. W. 38 (Iowa 1908).

Where no contract of sale was entered into and the sole question was whether the broker had produced a purchaser who was able to purchase on the defendant's terms, and one of the terms was a cash payment of considerable amount, the broker was required to show that the proposed purchaser had available funds. And assets consisting of stock in business and claims against third parties were not held sufficient.³¹

Where an informal contract is agreed upon, and the proposed buyer is to pay \$450 on the signing of the formal contract, and a large amount at the closing of title³² and the vendor refuses to execute the formal contract as agreed, the question of the financial ability of the purchaser, it seems, should be whether he was financially able to pay the deposit at the time agreed, not whether he was *then* able to pay the entire purchase price.³³

§ 154. When Financial Ability of Purchaser Need Not be Shown.

The purchaser's ability is generally presumed unless the contrary appear.³⁴

The owner cannot avail himself of the objection that the customer procured by the broker is not able to pay for the premises, after he has accepted such purchaser as satisfactory and has entered into an enforceable contract of purchase and sale with him.³⁵ Where a contract of sale is actually made, the broker, to recover his commissions, need not show the financial ability of the proposed buyer.³⁶ So where all the terms of the sale are agreed upon and the vendor accepts the proposed pur-

³¹ Schnitzer v. Price, 122 App. Div. 409 (N. Y. 1907).

³² See § 364 *infra* as to meaning of the term "closing of title."

³³ Levy v. Ruff, 4 Misc. 180 (N. Y. 1893).

³⁴ McFarland v. Lillard, 2 Ind. App. 166 (1891).

³⁵ Alt v. Doscher, 102 App. Div. 344 (N. Y. 1905); Watkins Co. v. Thetford, 96 S. W. 72 (Tex. 1906); Parker v. Walker, 86 Tenn. 571 (1888); Phintzy v. Bush, 129 Ga. 486 (1907); Glade v. Eastern Ill. Ming. Co., 107 S. W. 1005 (Mo. 1908), (citing Wright v. Brown, 68 Mo. App. 577).

³⁶ Beckley v. Morton, 140 Ill. App. 304 (1908).

chaser, the broker need not show the financial ability of this purchaser.³⁷ Nor need he show it, it has been said, where the vendor refuses to sell for reasons other than the financial inability of the purchaser.³⁸ Thus where the purchaser stated that he had a certified check to pay on account of the purchase price, and was willing to make the contract, and the owner refused to make the contract because he had since advanced the price, an actual exhibition of the tender of the check was held not necessary.³⁹

Financial ability of the purchaser is not a proper subject of inquiry where the contract has been executed, and no question is raised concerning same by the vendor, and where there is no question of bad faith or that the broker induced the vendor to execute the contract by representations as to the financial ability of the purchaser.⁴⁰ Nor is it essential to show the financial ability of the purchasers if the agent is employed to effect a sale on specified terms to designated persons.⁴¹

But what has already been said must also be considered from another viewpoint. As we have seen,⁴² there are cases which hold that the broker's obligation is not completed until the purchaser produced by him carries out his contract. Where such rule prevails, the force of the decisions above referred to is necessarily limited, or fails altogether.⁴³

And "it is, of course, possible for a broker, by special contract, to make his compensation contingent upon the actual payment of the purchase price. Thus, where, by special contract, a broker's commission depends upon fulfillment by the purchaser of his contract to purchase,

³⁷ *Brand v. Nagle*, 122 App. Div. 490 (N. Y. 1907).

³⁸ *McFarland v. Lillard*, 2 Ind. App. 166 (1891).

³⁹ *Harrell v. Velth*, 13 N. Y. St. Rep. 738 (1888).

⁴⁰ *Fleet v. Barker*, 120 App. Div. 455 (N. Y. 1907).

⁴¹ *Stoutenburgh v. Evans*, 120 N. W. 59 (Iowa 1909).

⁴² §§ 117-119 *supra*.

⁴³ See *Moore v. Irvin*, 20 L. R. A. (N. S.) 1168, and notes; s. c., 116 S. W. 662 (Ark. 1909).

he cannot recover his commission where the purchaser does not perform because of financial inability, although, after his default, the contract was cancelled by mutual agreement of the parties.”⁴⁴

§ 155. Burden of Proof as to Financial Ability of Purchaser.

“ Whether in actions generally by agents to recover commissions for procuring purchasers, where there has been no consummation of the sale, the burden is upon the agent to show the ability of the proposed purchaser to pay the consideration, or upon the seller to show the want of that ability, is a question about which there is a conflict of authority. Some hold that solvency and ability are to be presumed; others maintain the opposite doctrine. In view of the particular facts of the case (the purchaser had been accepted without condition or inquiry), we deem it unnecessary to express an opinion upon the broad question. Whatever doubt there may be as regards the general question above stated, we are of the opinion that when the principal accepts the purchaser without question of his ability to perform, and the sale fails of consummation of his own fault or failure to make good his offer, the burden is upon him, in order to defeat the agent’s rights to compensation, to show the purchaser’s want of ability.⁴⁵ In that case, where the facts were quite like those in this, the court said: ‘ Upon this question the authorities are conflicting, but we think the true rule is this: That as a general proposition, a broker who has been employed to sell is not entitled to recover his commission unless he shows that he procured a person willing, ready and able to purchase upon the terms

⁴⁴ *Moore v. Irvin*, 20 L. R. A. (N. S.) 1172 (Ark. 1909) where other authorities are cited.

⁴⁵ Citing *Davis v. Morgan*, 96 Ga. 518, 520; 23 S. E. 417.

prescribed by his principal; but where it appears that the proposed purchaser was accepted by the principal, the burden is upon the latter to show that the purchaser was not able to comply with the terms of the contract.' '' 46

⁴⁶ Dotson v. Milliken, 27 App. D. C. 515, 516 (1906), (citing Lockwood v. Halsey, 41 Kans. 166, 169; 21 Pac. 98; Fairly v. Wappoo Mills, 44 S. C. 227, 248; 29 L. R. A. 215; 22 S. E. 108). See also §§ 153, 154 *supra*.

CHAPTER XV.

TRANSACTION MUST BE COMPLETE.

§ 156. General Statement.

The broker must bring about a completed transaction, which requires that all the details of the bargain must be agreed upon. (§§ 157-160.)

Procuring a person who merely takes an option on the property does not entitle the broker to commissions. (§ 163.)

Where the broker fails to bring the customer up to the specified terms and abandons the negotiations, he is not entitled to commissions though the principal subsequently sells to the same person at the price fixed. (§ 164.)

§ 157. What Constitutes a Completed Transaction.

The broker must bring about a completed transaction.¹ On this the authorities are agreed. They differ, however, on the question as to what constitutes a completed transaction. Some authorities hold that when the broker has produced a purchaser ready, willing and able to purchase on his principal's terms, his obligation is performed. Others hold that the broker must bring about a valid enforceable contract of sale. The subject has already been presented and the authorities cited.²

No extended argument is necessary to show that in those jurisdictions where the broker is required to bring about an enforceable contract of sale, he has not brought

¹ *Buxton v. Beal*, 49 Minn. 230 (1892).

² §§ 117-119 *supra*.

about a completed transaction until the contract is actually executed. This chapter, therefore, deals only with the question as to what constitutes a completed transaction in those jurisdictions where the broker earns his commissions by producing a purchaser ready, willing and able to purchase on his principal's terms.

§ 158. General Rule as to Completeness of Transaction.³

There must be a meeting of the minds of both buyer and seller on all the terms of the transaction.⁴

Where the owner gives the broker the price and particular terms upon which the property is to be sold, and the owner thereafter capriciously refuses to make the sale to a person procured by the broker, able and willing to purchase on those terms, the broker earns his commission. But where the terms have not been definitely prescribed, the broker assumes the hazard of being able to find a person whose terms are so satisfactory to the owner that a definite arrangement might be made, and in respect to which the minds of the parties might, as a result, meet, and his commission is not earned until their minds do so meet.⁵

§ 159. All Details of Sale Must be Agreed Upon.⁶

A broker is not entitled to commission unless he shows that the parties to the proposed sale reached an agreement, not only as to the price but as to the terms of payment, the time of taking title, and all the details incident to such sale.⁷ Thus, under the customary contract of brokerage, a broker though he procures a pur-

³ See § 157 *supra* as to scope of this chapter.

⁴ *Runyon v. Wilkinson*, 57 N. J. L. 422 (1894); *Rockwell v. Newton*, 44 Conn. 333 (1877). See §§ 147, 148 *supra*.

⁵ *Forrester v. Price*, 6 Misc. 308 (N. Y. 1893); *Fairchild v. Cunningham*, 84 Minn. 524 (1901).

⁶ See § 157 *supra* as to scope of this chapter.

⁷ *Peace v. Ross*, 123 App. Div. 611 (N. Y. 1908); *Caston v. Quimby*, 178 Mass. 153 (1901).

chaser who is willing and able to *pay the price* asked, is not entitled to commissions if the minds of the parties do not meet in a contract, the details of which are worked out and understood between them, the sale not being consummated by reason of a lack of agreement as to its terms and conditions, as for instance, a failure to agree on a time when the title should be closed,⁸ or the refusal of the vendor to obligate himself to dig a well.⁹

§ 160. Effect of Special Conditions on Completeness of Transaction.¹⁰

Where the purchaser's assent to buy is qualified by a statement that he accepts the vendor's offer and has forwarded contract to be signed, it is really an acceptance according to the contents of such contract, but unless the contract is satisfactory, or complies with the vendor's proposition, no completed transaction can be said to have resulted.¹¹

Where the broker has brought a purchaser ready and willing to purchase on the owner's terms, and an informal agreement is reached, but the vendor refuses later to make a formal contract, the fact that the broker subsequently endeavors to have the parties agree on new terms does not amount to a waiver of his right to commissions.¹²

And in a Nebraska case, it was said that "when the price of property and terms of payment are fixed by the seller, and the broker's engagement is to procure a purchaser at that price and upon those terms, if, upon the procurement of the broker, a purchaser is produced with whom the seller himself negotiates and effects a sale, although the terms may be changed and even the sale

⁸ *Haase v. Schneider*, 112 App. Div. 336 (N. Y. 1906). See § 364 *infra* as to meaning of "closing of title."

⁹ *Smith v. Allen*, 101 Iowa 608 (1897).

¹⁰ See § 157 *supra* as to scope of this chapter.

¹¹ *Runyon v. Wilkinson*, 57 N. J. L. 423 (1894). See also § 163 *infra*.

¹² *Levy v. Ruff*, 4 Misc. 180 (N. Y. 1893).

itself finally abandoned, he is entitled to his commission.”¹³

So where the broker was authorized to sell, nothing being said about the character of the deed to be given, and the owner refuses to contract only because the purchaser produced by the broker insists on a warranty deed, which the owner declines to give on account of a supposed defect in part of the title, the broker cannot recover commissions, since it cannot be said that the minds of the parties met.¹⁴ And it was held in *Guthmann v. Meyer*, 31 Misc. 810 (N. Y. 1900) that a broker is not entitled to commission where his principal and the proposed purchaser failed to consummate a sale because of a dispute over taxes.

But where the broker produces a purchaser ready, able and willing to purchase, and the only objection of the owner is that the purchaser's acceptance did not provide for the same terms of interest required by the owner, and the broker offered to have the acceptance complied with and to pay the difference then and there, the broker was held entitled to his commissions, the court deeming the owner's objection too trivial.¹⁵ And where an owner listed his property with two brokers to one of whom he had given a fixed price (\$12,400), and a buyer not knowing this, proposed to buy the property from the other broker at a higher price (\$13,000), but later discovering the facts, negotiated with the first broker at \$12,400, and the owner, though duly notified thereof, refused to accept, preferring the larger offer, it was held that the broker with the \$12,400 offer had earned his commission.¹⁶

And where a broker procures a customer to whom his employer agrees to sell, he is entitled to recover commis-

¹³ *Potvin v. Curran*, 13 Nebr. 302 (1882).

¹⁴ *Hess v. Bloch*, 56 Misc. 480 (N. Y. 1907). See also § 133 *supra*.

¹⁵ *Riker v. Post*, 125 App. Div. 607 (N.Y. 1908).

¹⁶ *Lovett v. Clench*, 115 App. Div. 635 (N. Y. 1906).

sions notwithstanding that thereafter the employer refuses to enter into a formal contract of sale because a building upon the land intended to be conveyed encroaches upon adjoining land.¹⁷

§ 161. Effect of Failure to Contract.

As stated in § 157, those jurisdictions which require an executed contract of sale before the broker is entitled to commissions are expressly excluded from the considerations of this chapter. It may therefore be stated broadly that it is sufficient if the broker duly employed has found a purchaser ready, willing and able to enter into such a contract, or to purchase on his employer's terms.¹⁸ It is not necessary that a written contract of sale should have been entered into between the parties in order to entitle the broker to his commissions,¹⁹ nor that a conveyance of the property intrusted to him for sale should actually be consummated between his employer and customer.²⁰ So long as an agreement has been reached, though not reduced to writing, the owner is liable for broker's commissions even though he recedes from the agreement before it has been reduced to writing.²¹

But the broker may obligate himself not only to find a purchaser but to procure a contract of sale in writing, and when this is the arrangement he can claim no commission until such written agreement to purchase is furnished.²²

In *Norman v. Reuther*, 25 Misc. 161 (N. Y. 1898), it

¹⁷ *Cusack v. Alkman*, 93 App. Div. 579 (N. Y. 1904).

¹⁸ See § 96 *supra*; also *Duclos v. Cunningham*, 102 N. Y. 678 (1896); *Lunney v. Healey*, 44 L. E. A. 601 (1898).

¹⁹ *McFarland v. Lillard*, 2 Ind. App. 163 (1891); *Vaughan v. McCarthy*, 59 Minn. 202 (1894); *Millan v. Porter*, 31 Mo. App. 576 (1888), (citing *Keys v. Johnson*, 68 Pa. St. 43; *Tyler v. Parr*, 52 Mo. 249, and other Missouri cases).

²⁰ *Martin v. Bliss*, 57 Hun 157 (N. Y. 1890).

²¹ *Levy v. Ruff*, 4 Misc. 180 (N. Y. 1893), (citing *Barnard v. Monnot*, 3 Keyes (N. Y.) 203; *Krahner v. Hellman*, 30 N. Y. St. Rep. 434; *Kalley v. Baker*, 132 N. Y. 1; *Gilder v. Davis*, 137 N. Y. 506).

²² *McFarland v. Lillard*, 2 Ind. App. 165 (1891).

was held in the case of an exchange, that the broker must show that he had procured a valid contract for exchange.

§ 162. Modification of Terms.

Where a broker has procured the making of a contract, he is entitled to commission, although the parties subsequently agree to a modification thereof without the intervention of the broker.²³ And where the parties are brought into communication by the broker's agency, the principal, by negotiating with the purchaser on different terms, waives the terms given to the broker.²⁴

§ 163. Options and "Alternative" Contracts.

We have already seen,²⁵ that a broker is not entitled to commission for procuring a person who merely takes an option to purchase. A distinction must, however, be made between a mere option to purchase, the bringing about of which gives the broker no right to commissions, and a contract entered into between the seller and the purchaser which provides for liquidated damages in case of non-performance. An option is an exclusive *privilege to buy*. It binds the one who makes it, but not the one to whom it is made, unless he accepts, when it becomes binding upon both.²⁶ Acceptance of the option does not mean the mere receiving of the agreement, but means an acceptance of the offer contained in the option according to its terms.²⁷ On the other hand, a contract of sale which provides for liquidated damages in case of the default or non-performance of either party, is none the less a contract of sale and not an option. Parties are not released from performing their agreement by inserting

²³ *Jones v. Henry*, 15 Misc. 151 (N. Y. 1895).

²⁴ *Davis v. Gassette*, 30 Ill. App. 44, 45 (1888). See also §§ 134, 135 *supra*.

²⁵ § 149 *supra*.

²⁶ *Benedict v. Pincus*, 191 N. Y. 382, 383 (1908).

²⁷ *Pomeroy v. Newell*, 117 App. Div. 802 (N. Y. 1907).

a penalty for non-performance. Specific performance may, nevertheless, be had.²⁸ "The question always is, what is the agreement? Is it that one certain thing shall be done, with a penalty added to secure its performance, or is it that one of two things shall be done, namely, the performance of the act, or the payment of the sum of money? If the former, the fact of the penalty being annexed will not prevent equity from enforcing performance of the very thing and thus carrying out the intention of the parties; if the latter, the contract is satisfied by the payment of a sum of money and there is no ground for equitable procedure against the party having the election. Stipulating the damages and promising to pay them in case of default in the performance of an otherwise absolute undertaking, does not constitute an alternative contract." ²⁹

The contract for the sale of real estate may provide for the payment of a sum of money as liquidated damages by the party failing to perform, and thus the contract may in a certain sense be optional with either party, yet if the employer signs or approves the contract, there is no reason to doubt that in such a case, although in the end the purchaser may not take a conveyance of the real estate, preferring to pay the liquidated damages, the broker has earned his commissions.³⁰ If in such a case the employer wishes to be exempt from the payment of commissions or to confine the commissions to the amount of the liquidated damages paid in lieu of performance, he should stipulate for such exemption in the contract with his broker.³¹

Where, however, a contract was procured by the broker, and approved and confirmed by the principal pre-

²⁸ *Phoenix Ins. Co. v. Continental Ins. Co.*, 14 Abb. Pr. N. S. 266 (N. Y. 1873); *Zimmermann v. Herzog*, 13 App. Div. 213 (N. Y. 1897).

²⁹ *Crane v. Peer*, 43 N. J. Eq. 558, 563.

³⁰ But see *Lawrence v. Rhodes*, 188 Ill. 96 (1900); *Moss v. Wren*, 118 S. W. 149 (Tex. 1908).

³¹ *Gilder v. Davis*, 137 N. Y. 506 (1893).

scribing that a certain amount was to be paid down on account of the purchase price, which was done, and the balance was to be paid as soon as a company to be organized by the purchaser was formed and enough stock subscribed to meet the payment, and that in event of the failure of the purchaser to organize the company and obtain enough subscriptions to pay the balance of the purchase price within a specified time, the payment on account of the purchase price should be forfeited to the seller, and it was so forfeited, the New York Court of Appeals thought it a just view that the broker should at least receive his commissions upon the sum paid and forfeited by the purchaser. And this is so, notwithstanding that the seller informed the broker that he should not be entitled to commissions until the final purchase money was paid and the broker expressed his satisfaction with the arrangement. The Court in fact went even further, stating that while it was not necessary to be determined it was by no means clear that the broker was not entitled to his full commissions.³²

But a broker is not entitled to commissions upon effecting a provisional agreement for a sale,³³ which fails because the purchaser avails himself of a reserved privilege to recede from the purchase upon the happening of a specified contingency not dependent upon the action of the vendor.³⁴

§ 164. Abandonment by Broker.

Where a broker opens negotiations, but, failing to bring the customer to the specified terms, abandons them, and the employer subsequently sells to the same person at the price fixed, he is not liable to the broker for com-

³² *Gilder v. Davis*, 137 N. Y. 506 (1893).

³³ *Barber v. Hildebrand*, 42 Nebr. 405 (1894).

³⁴ *Condict v. Cowdrey*, 139 N. Y. 273 (1893). And see *Lawrence v. Rhodes*, 188 Ill. 96 (1900); *Block v. Ryan*, 4 App. D. C. 283 (1894).

missions.³⁵ "The fact that a sale or exchange of the property is finally brought about by the efforts of the principal or another broker, with a person with whom the first broker had previously negotiated without success, will not furnish a legal basis for a claim for commissions by the first broker, especially when it appears that the first broker has for a long time ceased negotiations with the purchaser, and abandoned all efforts to induce him to take the property on the proposed terms."³⁶

Abandonment by the broker is matter of defense.³⁷

³⁵ *Markus v. Kenneally*, 19 Misc. 517 (N. Y. 1897); *Moore v. Cresap*, 109 Iowa 749 (1899); *Singer v. Hutchinson*, 61 Ill. App. 308 (1895). See also *Davis v. Gassette*, 30 Ill. App. 45 (1888).

³⁶ *Davis v. Gassette*, 30 Ill. App. 45 (1888), (citing *Lipe v. Ludewick*, 14 Ill. App. 372; *Sibbald v. Bethlehem Iron Works*, 83 N. Y. 378). See also §§ 97, 98 *supra* and 237 *infra*.

³⁷ *Moore v. Boehm*, 45 Misc. 622 (N. Y. 1904). See also § 336 *infra*.

CHAPTER XVI.

FAILURE OF PRINCIPAL TO COMPLETE.

§ 165. General Statement.

If, after the broker performs his obligation, the seller is unable to consummate the sale, or refuses to do so, the broker is nevertheless entitled to his commissions. (§§ 166-170.)

§ 166. The Broker's Obligation.

Here, as in the preceding chapter, it must be kept in mind that there is a conflict in the decisions as to what amounts to a performance of the broker's obligation. Briefly, the difference is this,—some cases hold that the broker must procure an enforceable contract of sale before he has earned his commissions, while others hold that the broker has earned his commission when he produces a purchaser ready, willing and able to purchase on his principal's terms. The latter may be regarded as the prevailing rule.

Some of the cases even go so far as to hold that the broker is not entitled to his commissions unless the sale is actually accomplished by the delivery of the deed of the land from the vendor to the vendee and the payment of the purchase money by the latter, or unless it is proven that the sale is prevented by the fault of the vendor.¹

These conflicting views are thus briefly referred to in order that the statements of the present chapter may be

¹ See §§ 117-119 *supra* and footnotes thereto.

considered accordingly, and so that the authorities given may not be confused and the attempt be made to apply them in jurisdictions where the prevalence of one or the other of the rules set forth might make these authorities inapplicable.

§ 167. General Rule as to Failure of Principal to Complete.²

If, after the broker produces a purchaser ready and willing to purchase the property upon the terms fixed by the seller, the seller is unable to consummate the contract or refuses to do so, the broker is nevertheless entitled to his commissions.³ The broker's right to commission is not to be defeated by any default of the principal.⁴ "If defendants (the owners) employed plaintiffs (the brokers) to find a purchaser for this property, the compensation was earned when they produced the purchaser upon the prescribed terms, and the inability of defendants to convey was an independent matter, for which they, and not plaintiffs, were responsible. The cases are uniform in this respect."⁵

"The just and well-settled rule of law requires that the agent shall be paid his compensation when he procures a purchaser who is acceptable to the principal, and ready, able and willing to buy on the agreed terms, though in fact the sale be not ultimately consummated, provided its consummation is prevented by the fault, refusal or defective title of the principal."⁶

² See § 166 *supra* as to scope of chapter.

³ *Mooney v. Elder*, 56 N. Y. 238 (1874); *Brackenridge v. Claridge*, 43 L. R. A. 593 (1898); *Ayres v. Thomas*, 116 Cal. 143 (1897); *McDermott v. Mahoney*, 115 N. W. 37 (Iowa 1908); *King Powder Co. v. Dillon*, 96 Pac. 441 (Colo. 1908).

⁴ *Ryer v. Turkel*, 70 Atl. 72 (N. J. 1908).

⁵ *McLaughlin v. Wheeler*, 1 S. D. 521 (1891), (citing *Hamlin v. Schulte*, 34 Minn. 534; 27 N. W. Rep. 301; *Mooney v. Elder*, 56 N. Y. 238; *Hannon v. Moran*, 71 Mich. 261; 38 N. W. Rep. 909).

⁶ *Cheatham v. Yarbrough*, 90 Tenn. 79 (1891), (citing *Mech. on Agency*, §§ 966, 967; 2 Am. & Eng. Ency. of Law, 578, 581; 2 Add. on Contracts (Morg. Ed.), § 931; *McGavock v. Woodlief*, 20 How. (U. S.) 221; *Koch v. Emmerling*, 22 How. (U. S.) 69; *Frazer v. Wyckoff*, 63 N. Y. 448; *Cook v. Fish*, 12 Gray 493; 88 Ind. 104, (s. c., 45 Am. R. 447); 57 Cal. 224; 31 Md. 270; *Glechrist v. Clarke*, 2 Pickle 585; *Parker*

That the seller's wife refused to consent to the arrangement cannot deprive the broker of commissions, if the general requisites of an earned commission exist.⁷ And when the broker produces a purchaser able and willing to perform, who is accepted by the seller, the seller cannot escape payment of the commission by thereafter declaring the deal off.⁸

And it has been said that where no sale is actually consummated, the broker must either have procured a valid obligation to buy, or have brought the proposed purchaser and the vendor together, so that a contract of sale might have been entered into if the latter so elected.⁹

§ 168. Defective Title as Cause of Failure.¹⁰

When the broker procures a party who contracts with his principal, it is no answer to the broker's claim for commissions that the principal is unable to make title,¹¹ unless the broker was apprised of the defective title and undertook, with such knowledge, to find a purchaser.¹² Where there is a defect in the vendor's title which is known to the broker, and he assures the vendor that the purchaser will take the property notwithstanding, he is not entitled to commissions when the purchaser later refuses to take the property on account of such defects, these not having been brought to his attention.¹³

“The law is well settled,” says the court in *Gerhart*

v. Walker, 2 Pickle 569, and dissenting opinion in the same case, 573). See also *Dotson v. Milliken*, 27 App. D. C. at 514 (1906), (citing *Koch v. Emmerling*, 22 How. 69; 16 L. Ed. 292; *McGavock v. Woodlief*, 20 How. 221; 15 L. Ed. 884; *Bryan v. Abert*, 3 App. D. C. 180, 181; *Cheatham v. Yarbrough*, 90 Tenn. 77, 79; 15 S. W. 1076; *Washburn v. Bradley*, 169 Mass. 86, 88; 47 N. E. 512; *Holden v. Starks*, 159 Mass. 503; 38 Am. St. Rep. 451; 34 N. E. 1069; *Knapp v. Wallace*, 41 N. Y. 477; *McFarland v. Lillard*, 2 Ind. App. 160, 166; 50 Am. St. Rep. 234; 28 N. E. 229).

⁷ *Goldberg v. Gelles*, 33 Misc. 793 (N. Y. 1901); *Brauch v. Moore*, 105 S. W. 1180 (Ark. 1907); *Pardy v. Wilson*, 108 S. W. 1124 (Mo. 1908).

⁸ *Miller v. Barth*, 35 Misc. 372 (N. Y. 1901). See also § 150 *supra*.

⁹ *Flynn v. Jordal*, 124 Iowa 458 (1904).

¹⁰ See § 166 *supra* as to scope of chapter.

¹¹ *Knapp v. Wallace*, 41 N. Y. 477 (1869); *Parker v. Walker*, 86 Tenn. 572 (1888); *Tackett v. Powley*, 130 Ill. App. 99 (1906); *Gillespie v. Dick*, 111 S. W. 664 (Tex. 1908); *Phintzy v. Bush*, 129 Ga. 486 (1907).

¹² *Parker v. Walker*, *supra*.

¹³ *Hynes v. Brettelle*, 70 Mo. App. 344 (1897).

v. Peek, 42 Mo. App. 651 (1890), "that when the owner of land employs a real estate agent to negotiate a sale only, it is always implied that the owner has a good title to the land. The agent, by his agreement to negotiate a sale, assumes no obligation in reference to the title unless it was made a part of his duty to have the title examined before attempting to effect a sale. Therefore, in such a case, if the agent finds and produces a purchaser, ready and willing to buy according to the owner's terms, or if he procures a valid contract from a solvent buyer and the sale is not effected in consequence of a defect or apparent defect in the title, and the owner refuses or declines to take any steps to remove the defect or cloud, or to produce to the purchaser evidence that the title is not in fact faulty, then the agent is entitled to his commissions the same as if he had consummated the sale."

And where the broker brings about an exchange, the party employing him cannot resist a claim for commission on the ground that the title of the other party to the exchange is defective and he is therefore unable to perform the contract.¹⁴

In some of the states, contracts of sale provide that if the purchaser finds any defects in the title the vendor shall have a specified time to remedy them, if that can be done.¹⁵

§ 169. Special Agreements as to Title.¹⁶

The owner of property may engage the broker under such an arrangement as to relieve himself from liability for commissions in case his title is defective, or in case the purchaser refuses or fails to carry out the contract,¹⁷ but if the broker is employed to find a purchaser without

¹⁴ Kalley v. Baker, 132 N. Y. 1 (1892). See also "Commissions on Exchanges," Ch. XVIII *infra*.

¹⁵ See the various forms of contracts of sale in Ch. XXXIX, *infra*.

¹⁶ See § 166 *supra* as to scope of chapter.

¹⁷ Flower v. Davidson, 44 Minn. 49 (1890).

any statement by the principal with respect to his title, and the broker has no personal knowledge of its character, the broker has a right to assume that the title is unobjectionable and to negotiate a sale upon that assumption.¹⁸

If the principal reveals to the broker the real state of his title, and it is agreed that the broker shall not be paid commissions unless he finds a purchaser who wil' take such title as the principal can make, the broker cannot recover unless he complies with this requirement.

The opinions of lawyers, conveyancers or title guarantee companies on the marketability of a title are not admissible.¹⁹ This is because the marketability of the title is a question of law for the court to determine. But lawyers' opinions are admissible on the validity of a title to property located in another state.²⁰ This is so, because what the law is in another state is regarded as a question of fact upon which the court must have evidence before it may make a determination.

§ 170. Special Causes of Failure.²¹

When a broker, duly employed, procures a customer to whom his employer agrees to sell, he is entitled to recover commissions, notwithstanding the fact that thereafter the employer refuses to enter into a formal contract of sale because a building upon the land intended to be conveyed encroaches upon adjoining land.²²

Also when the broker produces a purchaser at the price asked by the owner, he is entitled to commissions even though a contract of sale is not entered into, this failure resulting from the refusal of the owner to sign

¹⁸ *Cheatham v. Yarbrough*, 90 Tenn. 77 (1891).

¹⁹ *Moser v. Cochrane*, 107 N. Y. 35 (1887); *Hess v. Eggers*, 37 Misc. 846 (N. Y. 1902), (citing *Gatling v. Central S. V.*, 67 App. Div. 50 (N. Y. 1902)).

²⁰ *Barber v. Hildebrand*, 42 Nebr. 407 (1894).

²¹ See § 166 *supra* as to scope of chapter.

²² *Cusack v. Aikman*, 93 App. Div. 579 (N. Y. 1904); *Brackenridge v. Claridge*, 43 L. R. A. 595 (1898).

unless a provision were inserted providing for the payment of a forfeiture in case he could not carry out the contract,²³ or resulting from the owner's refusal to sell.²⁴ Nor can the broker's claim be defeated by the whimsical or unreasonable refusal of the seller to comply with his contract.²⁵

The rule that where a party gives a reason for his conduct and decision, he cannot after litigation has been begun, change his ground and put his conduct on another and a different ground, applies only to defects in form and matters of detail,—objections which a party could easily, and, it is to be presumed, would have removed had they been objected to, so that an after insistence upon them is an injustice, they not being of the substance of the contract. Therefore, when a principal did not put his refusal to accept an offer upon the ground that it was not in accordance with the terms he had given the broker, he may still insist that the broker did not prove an offer in accordance with the terms given him.²⁶

²³ *McQuillen v. Carpenter*, 72 App. Div. 595 (N. Y. 1902).

²⁴ *Caruthers v. Reesor*, 134 Ill. App. 370 (1907).

²⁵ *Crockett v. Grayson*, 98 Va. 357 (1900), (citing *McGavock v. Woodlief*, 20 How. 221; *Koch v. Emmerling*, 22 How. 69; *Tombs v. Alexander*, 101 Mass. 255). See also § 150 *supra*.

²⁶ *Rand v. Cronkite*, 64 Ill. App. 223, 224 (1896). See also § 193 *infra*.

CHAPTER XVII.

FAILURE OF CUSTOMER TO COMPLETE.

§ 171. General Statement.

When the contract of sale is executed, the broker has earned his commission (§ 172), except in a few jurisdictions where the performance of the contract is held essential to entitle the broker to commissions (see §§ 117-119 *supra*), or where the broker has made a valid and binding agreement to some other arrangement. (See §§ 227-235 *infra*.)

The authorities are quite unanimous that the right of the broker to his commissions does not depend upon the performance of the contract by the purchaser. (§ 172.)

But where the purchaser abandons the broker or refuses to deal through him, he is not entitled to commissions. (§ 173.)

Whether the broker is entitled to commissions where the sale is not completed, but would have been completed but for the misrepresentations of the vendor, *quere*. (§ 174.)

§ 172. General Rule as to Failure of Customer.

“ The general rule is that when a broker employed to negotiate a sale of real estate brings to his employer a responsible purchaser willing to buy upon the terms prescribed, he has earned his commissions.¹ Where the con-

¹ But see §§ 117-119, 157, 166 *supra*.

tract of sale is executed between the employer and the purchaser, the right of the broker to his commissions does not depend upon the performance of the contract by the purchaser.² If from a defect in the title of the vendor, or from a refusal to consummate the contract on the part of the purchaser for any reason in no way attributable to the broker the sale falls through, nevertheless the broker is entitled to his commissions for the simple reason that he has performed his contract."³

If the vendor enters into an enforceable contract of sale with the purchaser, the failure of the purchaser to carry out the contract does not deprive the broker of his right to commissions.⁴ But where the broker, knowing of defects in the title, fails to bring these to the attention of the purchaser, and assures the vendor that the purchaser will take the property notwithstanding the defective title, he is not entitled to commissions when the purchaser refuses to consummate the purchase on account of these defects.⁵

§ 173. Abandonment of Broker by Customer.

Where a broker presents the name of a customer, and the customer through no fault of the owner of the property, refuses to enter into any negotiations through such broker, the latter is not entitled to commissions if the premises are thereafter sold to the same customer through another broker.⁶

In *Oppenheimer v. Barnett*, 131 App. Div. 617 (N. Y. 1909), it is said that where the owner's broker calls the attention of a person to the fact that property is for sale, that in no way obligates such person to make the pur-

² *Tackett v. Powley*, 130 Ill. App. 100 (1906).

³ *Gilder v. Davis*, 137 N. Y. 506 (1893); and see note in *Lunney v. Healey*, 44 L. R. A. 623 (1898).

⁴ *Pinkerton v. Hudson*, 113 S. W. 35 (Ark. 1908). Cf. §§ 117-119 *supra*.

⁵ *Hynes v. Brettelle*, 70 Mo. App. 344 (1897).

⁶ *Sampson v. Ottinger*, 93 App. Div. 226 (N. Y. 1904).

chase through him; on the contrary, such person may go directly to the seller and make the best trade he can with him, or he may purchase through some broker whom he selects himself. In either case, the broker whom the seller had originally employed would have no cause for complaint against the purchaser or against the broker to whom the seller paid the commissions. If the broker is entitled to commissions at all, it is from the seller, and if the broker is the procuring cause of the sale, he must look to him and not to the purchaser. The purchaser of real estate is not obliged to see that a broker employed by the seller gets the commissions to which he claims he is entitled.

§ 174. Misrepresentations by Vendor.

Where the sale would have been completed but for the misrepresentations of the vendor, the broker has been held entitled to his commission.⁷

On the other hand, where the broker was familiar with the property and the owner misstated the dimensions, and the proposed buyer, after making a deposit, refused to enter into a contract, because the dimensions were less than stated, the broker was denied commissions.⁸ And where the owner stated the frontage of the lot, and it turned out that the frontage was less than stated and the purchaser produced by the broker refused to make contract on account of such shortage, the broker was held not entitled to commissions, the Second Department of the Appellate Division of the New York Supreme Court holding that it was the broker's duty to procure a purchaser for the plot "just as it was."⁹

⁷ Gillespie v. Dick, 111 S. W. 604 (Tex. 1908); Dotson v. Milliken, 209 U. S. 237 (1908); Goodman v. Hess, 56 Misc. 482 (N. Y. 1907), misstatement of rents; and see Crockett v. Grayson, 98 Va. 357 (1900), and Hugill v. Weekley, 15 L. R. A. (N. S.) 1262; s. c., 61 S. E. 360 (W. Va. 1908).

⁸ Hausman v. Herdtfelder, 81 App. Div. 46 (N. Y. 1903).

⁹ Keough v. Meyer, 127 App. Div. 273 (N. Y. 1908).

And in another New York case,¹⁰ it was said that there is no duty on the part of a real estate owner to inform a broker as to whether there are covenants as to nuisances in his chain of title, unless he is asked about it, and that it is the duty of the broker to ask, if he wants to know.¹¹

¹⁰ *Ranger v. Lee*, 66 Misc. 144 (N. Y. 1910).

¹¹ See § 168 *supra* as to the vendor's liability for commissions where the consummation of the sale is prevented by the defective title of the vendor. For a general discussion of misrepresentations, see Part IV, "Fraud," §§ 279 *et seq.*

CHAPTER XVIII.

COMMISSIONS ON EXCHANGES OF PROPERTY.

§ 175. General Statement.

The same rules apply to an exchange of property as to its sale. (§§ 176-178.)

Authority to sell does not imply authority to exchange. (§ 179.)

While under the general rule a broker cannot recover commissions from both sides, yet where both agree in the contract to pay the broker, their knowledge of the situation appears. (§ 180.)

If a contract of exchange is brought about by the broker, he is entitled to his commission even though one of the parties be unable to fulfill the contract. (§§ 181-183.)

§ 176. Conflicting Decisions as to When Commissions are Earned.

Some decisions hold that the broker is not entitled to commissions until he has brought about a valid enforceable contract, and some that the contract must be actually performed, while others hold that the commissions are earned when the broker has produced a customer ready, willing and able to purchase on his principal's terms.¹ There is the same conflict of decisions as to when commissions on an exchange are earned.

Save as to those sections dealing with failure to fulfill contract,² the authorities presented in this chapter deal primarily with the situation as it is affected by the

¹ See §§ 117-119, 157, 166 *supra*.

² See §§ 181-183 *infra*.

rule that commissions are earned when the broker produces a party ready, able and willing to meet the requirements of the broker's employer.

§ 177. Commissions on Exchanges.

The broker may, as in a sale, obligate himself to various conditions which will affect his claim to commissions.³ Under the ordinary employment, however, his commissions are earned when he produces a person ready, able and willing to perform his part of the agreement upon the terms named by the broker's employer.⁴

"To entitle a real estate broker to compensation," says the court in *Mutchnick v. Davis*, 130 App. Div. 419 (N. Y. 1909), "he must produce a customer not only willing but able to purchase his client's property upon the terms fixed by such client. The same rule applies to a proposed exchange of real estate."⁵ Commissions are earned when a customer is procured ready to make an exchange on terms satisfactory to the employer.⁶

§ 178. Employment.

We have already seen that one of the requisites to a broker's commissions, is employment.⁷ The same applies to an exchange.⁸ A volunteer has no claim to commission. Thus, where a person ascertained that A desired to sell or exchange, and presented A's card to B, which resulted in an exchange, it was held that the broker was not entitled to commission.⁹

³ See §§ 113-119 *supra*.

⁴ *Lockwood v. Halsey*, 41 Kans. 170 (1889); *Snydam v. Healy*, 93 App. Div. 396 (N. Y. 1904); *cf. Norman v. Reuther*, 25 Misc. 161 (N. Y. 1898). See also §§ 181-183 *infra*.

⁵ See also *Schulté v. Meehan*, 133 Ill. App. 499 (1907).

⁶ *Hannan v. Prentiss*, 124 Mich. 419 (1900). Where a person refuses to enter into an exchange effected by the broker, see *Mulhall v. Bradley*, 50 App. Div. 179 (N. Y. 1900), as to whether the broker is entitled to recover as damages the commissions the other party to the exchange was to pay him.

⁷ See Ch. X *supra*.

⁸ See Form 38 *infra*, Ch. XL, "Authority of Broker to Exchange Property."

⁹ See *Walton v. M'Morrow*, 63 App. Div. 147 (N. Y. 1901); *aff'd*, 175 N. Y. 493 (1903), no opinion.

§ 179. Authority to Sell Does Not Give Authority to Exchange.

Though a broker has authority to sell, this does not in itself either give or imply authority to exchange. "In the absence of any trade usage, the power to sell does not carry with it or imply the power to barter or exchange."¹⁰

§ 180. Commissions from Both Sides.

The rule that a broker cannot act for both sides, without their knowledge if he is vested with any discretion, applies to an exchange.¹¹ But the broker may recover his commissions from both parties where they knew that he was acting for both sides, and this would appear where the contract provides that each of the parties is to pay the broker a commission.¹² It has even been intimated that the principals might reasonably assume that, in an exchange of property, a broker receives commissions from both sides.¹³

§ 181. Rule When Contract Has Been Executed.

As has been shown, the broker's commissions are not earned until he has produced a customer not only ready and willing, but *able* to exchange. This requires a valid title to the property proffered by the customer and the broker is not entitled to a commission on the transaction until this requirement is met. When, however, an enforceable contract of exchange has been entered into, the conditions are different. "The ordinary rule is that, in

¹⁰ *Kearns v. Nickse*, 66 Atl. 779 (Conn. 1907), (citing *Woodward v. Jewell*, 140 U. S. 253; 35 L. Ed. 481; 11 Sup. Ct. Rep. 784; *Hayes v. Colby*, 65 N. H. 193; 18 Atl. 251; *Drury v. Barnes*, 29 Ill. App. 166; *Cleveland v. State Bk.* 16 Ohio St. 236; 88 Am. Dec. 445; *Trudo v. Anderson*, 10 Mich. 357; 81 Am. Dec. 795; *Brown v. Smith*, 67 N. C. 245); *Moran v. James*, 20 Misc. 235 (N. Y. 1897); *Davis v. Gassette*, 30 Ill. App. 44 (1888). See also *Menlfee v. Higgins*, 57 Ill. 50 (1870).

¹¹ See § 51 *supra*.

¹² *Willner v. Seale*, 127 App. Div. 180 (N. Y. 1908).

¹³ *Marks v. O'Donnell*, 66 Misc. 147 (N. Y. 1910). See §§ 48-53 *supra* as to broker's right to act for both sides.

the absence of an express agreement to the contrary, a real estate broker employed to effect an exchange of real estate is entitled to his commissions, where, through his procurement, a contract for the exchange of properties has been agreed upon and entered into between his customer and the person with whom the exchange was to be effected, even though one of the parties be unable to fulfill the contract."¹⁴

Thus, where the broker is employed in the ordinary way to bring about an exchange and the defendant enters into a contract for the exchange, and it then develops that the person who entered into the contract with the defendant had no title to the property which he agreed to exchange for the defendant's property, the broker is entitled to his commissions.¹⁵

Where the broker is employed to effect an exchange, he has earned his commission when the principal makes a valid agreement with the customer produced by the broker, even if it turns out that the customer cannot make a good title, provided the broker acted in good faith. There is no distinction between a sale and an exchange in this respect.¹⁶ The case just cited (*Roche v. Smith*, 176 Mass. 595) says that the ground on which this is settled is that by entering into a valid contract with the customer, the principal accepts the customer as able, ready and willing.

Where one of the parties to an exchange fails to perform the written agreement of exchange previously entered into and the exchange is not made, the broker who brought the parties together may recover his commissions from his principal, even though the exchange was not made and the broker's principal was not at fault.¹⁷ And

¹⁴ *Norton v. Genesee Nat. Savings & Loan Assn.*, 57 App. Div. 520 (N. Y. 1901), (citing *Kalley v. Baker*, 132 N. Y. 1 (1892)); *Charles v. Cook*, 88 App. Div. 81 (N. Y. 1903).

¹⁵ *Baumann v. Nevins*, 52 App. Div. 290 (N. Y. 1900).

¹⁶ *Roche v. Smith*, 176 Mass. 595; 51 L. R. A. 510 (1900).

¹⁷ *Leete v. Norton*, 43 Conn. 219 (1875).

this is particularly so where the contract of exchange provides that if either of the parties neglect or refuse to perform the same, the other shall be entitled to a fixed amount as damages.¹⁸

It must be noted, however, that while the broker is not a guarantor of the title offered, and broker's commissions cannot be defeated because of a defect in the principal's title, yet where it was a condition of an exchange that perfect title should be shown by an abstract to be furnished for that purpose, the terms are not complied with and the commissions are not earned unless a person is produced who is able to show the title required by the contract.¹⁹

§ 182. Reason for Rule.²⁰

“In an action by a broker to recover commissions upon a proposed exchange of real property, it is necessary for him to show,” says the court in *Mutchnick v. Davis*, 130 App. Div. 419 (N. Y. 1909), “that the customer produced by him was the owner of the property offered to be exchanged as well as that, after the terms of the exchange had been agreed upon, the client refused to carry them out.”²¹ Where the agreement to sell or exchange real property no longer remains executory but has been consummated by an actual execution of a written contract therefor the rule is different, and in the absence of any stipulation to the contrary the broker's commissions are earned when the contract is signed by the client, and a defect in title under such circumstances becomes unimportant and constitutes no defense to the payment of the commissions.²² The distinction between these two situations

¹⁸ *Id.*

¹⁹ *Barber v. Hildebrand*, 42 Nebr. 407 (1894).

²⁰ See § 176 *supra* as to scope of this chapter.

²¹ Citing *Woolley v. Lowenstein*, 83 Hun 155 (N. Y. 1894); *Alt v. Doscher*, 102 App. Div. 344 (N. Y. 1905).

²² Citing *Kalley v. Baker*, 132 N. Y. 1 (1892); *Gilder v. Davis*, 137 N. Y. 504 (1893).

is very wide and very apparent. In the absence of any stipulation to the contrary a marketable title to real property is always presumed to be bargained for; ²³ and when a broker produces a person who proposes to exchange property with his client, that person must have good title to the property which is proposed to be given in exchange. On the other hand, if the client sees fit to execute a contract and exchange property, whether the other person has a good title or not, the broker has performed his service to the satisfaction of his client and has earned his commission." ²⁴

Where the broker brings about an exchange, the party employing him cannot resist a claim for commission on the ground that the title of the other party to the exchange is defective and that he is therefore unable to perform the contract. ²⁵

In *Baumann v. Nevins*, 52 App. Div. 290 (N. Y. 1900), the court said: "If the defendant employed him to effect the exchange, and he brought parties ready and willing so to do, and a contract was entered into binding upon them, it was an acceptance by the defendant of the purchasers proposed by the plaintiff, and he became entitled to his commission, entirely independent of the fact as to whether the defendant could convey or not. The plaintiff was not an insurer of the defendant's title. If he chose to employ a broker to dispose of property to which he had no title, and the broker brought purchasers who were acceptable to him, and a contract was entered into between them for the purchase, it was entirely immaterial to the broker as to whether his employer had title or not. His work was accomplished, and his commission did not depend upon the fact of the ability of his employer to carry out his contract. The provision in the contract in regard to the time

²³ *Citing Scudder v. Watt*, 98 App. Div. 228 (N. Y. 1904); *Burwell v. Jackson*, 9 N. Y. 535 (1854).

²⁴ See the authorities under Chap. XVII *supra*.

²⁵ *Kalley v. Baker*, 132 N. Y. 1 (1892); *Roche v. Smith*, 176 Mass. 595; 51 L. R. A. 510 (1900). See also § 168 *supra*.

for the completion of the purchase was entirely for his benefit, and his default in conveying the title could not defeat the plaintiff's claim for commissions." Of course the broker must have acted in good faith in such a case.

It is somewhat difficult to follow the words of this opinion, for in its course the court speaks at one and the same time apparently about the proposed purchasers not having title²⁶ and then about the defendant not having title, while the facts of the case seem to indicate that the only question was as to the proposed purchaser's title. It may be that the court in speaking about the defendant's position in not being able to convey, intended that as a statement of the law if the facts had been that way, while on the other hand it may mean that as the proposed purchasers were unable to convey their property, therefore the defendant was unable to convey his in exchange.

In a dissenting opinion, Justice Ingraham says: "I do not understand that a broker complies with the terms of his employment until he brings a customer, not only ready and willing, but also able to purchase the property upon the terms proposed; and the production of a person ready to sign a contract, but who was manifestly unable to perform it, does not comply with the conditions of employment under which the broker is entitled to recover his commissions."

Also in *Norman v. Reuther*, 25 Misc. 161 (N. Y. 1898), it was held (in an exchange), that the broker must show that he had procured a valid contract of exchange, and that it was not sufficient to show that the broker had secured a person who was not the owner of the property, to sign a contract for the exchange.²⁷

§ 183. Rule as Affected by Broker's Bad Faith.

Where a written agreement for an exchange was pro-

²⁶ See § 181 *supra*.

²⁷ See also § 183 *infra*.

cured by the broker, but it turned out that the other party to the exchange did not own all the land which he agreed to convey and was not able to make a title at the appointed time, and the broker knew that the party he procured did not own the property he was to convey in exchange, and such party became financially irresponsible, and went into insolvency, the lower court refused the broker commissions. The Supreme Judicial Court sustained the judgment,²⁸ but apparently only because of the exceptional facts, saying: "In view of the state of the evidence, we do not regard this as an abstract unqualified ruling that in all cases in order to entitle a broker to his commission, the contract of sale or exchange must be one which could be enforced specifically; we construe it rather as a ruling on the specific facts which the Judge expressly or probably found. We think that the Judge only meant to say that a broker does not earn his commission by bringing a person to his employer who assumes to contract as owner, when, in fact, he is not owner, as the broker knows and the employer does not know, and who, within the few days allowed for performance turns out unable to perform his contract and irresponsible."²⁹ We regard this proposition as correct, and as consistent with the well-settled law that, in general, commissions are earned when a binding contract of sale is made."³⁰

²⁸ *Burnham v. Upton*, 174 Mass. 409 (1899).

²⁹ Referring to *Butler v. Baker*, 17 R. I. 582; *Greusel v. Dean*, 98 Iowa 405; 4 Am. & Eng. Ency. of Law (2nd Ed.), 972-975, Sub. V. "Brokers."

³⁰ Citing *Rice v. Mayo*, 107 Mass. 550; *Ward v. Cobb*, 148 Mass. 518, 521.

CHAPTER XIX.

COMMISSIONS ON LOANS.

§ 184. General Statement.

In some jurisdictions commissions on loans are not earned until the loan is actually made, or refused because of the fault or miscarriage of the principal. Elsewhere they are held to be earned when the broker has procured a lender ready, willing and able to loan on the principal's terms. (§§ 185-190.)

Defects in title to property may defeat a loan but do not deprive the broker of his claim for commission. (§ 191.)

The broker must have been duly employed, and the loan must be procured on the terms of his principal. (§§ 192-193.) And the broker is entitled to his commission after a loan has been found, even though the principal refuses to accept. (§ 194.)

§ 185. Commissions for Procuring Loan.

We have seen that there is some conflict in the decisions on the question as to when the broker has earned his commissions on a sale of property.¹ And so, there is a difference of opinion as to when the broker is entitled to his commissions with reference to procuring mortgage loans on real estate. The conflict of opinion on the subject with respect to loans is, however, somewhat different than that with respect to sales, or, at least, must be stated differently.

¹ See §§ 117-119 *supra*.

There are authorities which hold that the broker's obligation in the matter of a loan is not regarded as fully performed until the prospective lender actually makes the loan, or refuses because of the fault or miscarriage of the principal. Among the decisions to this effect are those of the courts of New York State.² The above rule will therefore be called the "New York rule" in this chapter.

On the other hand, there are authorities which hold that a loan broker is entitled to his commissions when he has procured a lender who is ready, willing and able to lend the money upon the authorized terms. This type of cases is also illustrated in the present chapter.

§ 186. New York Rule.

A broker employed to procure a loan on real estate is not entitled to his commissions on mere proof that he secured a person able and willing to make the loan, who was accepted by his principal. The contract of brokerage in the matter of a loan differs from one with respect to a sale of real estate, in that it is not regarded as fully performed until the prospective lender actually makes the loan or refuses because of the fault or miscarriage of the principal.³ In *Henken v. Schwicker*, 174 N. Y. at 302 (1903), the New York Court of Appeals said, though perhaps obiter, that in the absence of more definite specifications, the broker's commissions are earned when he procures a lender ready and willing to make the loan.

But where a broker has secured the acceptance of a loan, but the loan is not made because the owner's title is defective, the broker is entitled to his commissions. In such case, the broker must show clearly that the title is defective and that the money was not advanced for that

² See § 186 *infra*.

³ *Duckworth v. Rogers*, 109 App. Div. 168 (N. Y. 1905); *Ashfield v. Case*, 93 App. Div. 452 (N. Y. 1904).

reason. The mere fact that the title was rejected by lawyers or title guarantee companies, does not have the effect of establishing that the title was defective as a matter of fact. The specific facts must be shown evidencing the defect.⁴ And in such a case the broker cannot recover under an allegation of full performance. He must allege the fact of non-performance and the reason or excuse therefor.⁵

§ 187. New York Rule as Affected by Failure of Principal.⁶

And while "the general rule applicable to the employment of brokers to procure a loan is that their commissions are not earned unless the loan is made,"⁷ this rule would not be applicable where the negotiations fall through on account of the principal's misrepresentation as to the security to be given.⁸ This condition emphasizes the importance of having most satisfactory proof of the ability, readiness and willingness of the party to make the loan and to show that the failure to consummate the same was solely owing to the failure of the broker's principal.⁹ "In other words," says the court,¹⁰ "there may be a liability for a breach of a contract where a person after employing a broker to make a loan on certain securities discovers that his securities are not as valuable as he supposed and that he would be unable to perform a contract to furnish securities for a loan according to his representations to his broker, but that would not afford a basis for a recovery by the broker of *commissions* as for full performance on his part."

⁴ *Gatling v. Central Spar Verein*, 67 App. Div. 50 (N. Y. 1902). See also §§ 168, 169 *supra*.

⁵ *Stone v. Goodstein*, 40 Misc. 482 (N. Y. 1906).

⁶ See § 185 *supra*.

⁷ *Holliday v. Roxbury Distilling Co.*, 130 App. Div. 654 (N. Y. 1909), (citing *Crasto v. White*, 52 Hun 473 (N. Y. 1889); *Ashfield v. Case*, 93 App. Div. 452 (N. Y. 1904); *Duckworth v. Rogers*, 100 App. Div. 168 (N. Y. 1905)).

⁸ See § 174 *supra*.

⁹ *Holliday v. Roxbury Distilling Co.*, *supra*.

¹⁰ *Id.*

An allegation that the broker was to *procure* the loan is not established by proving that he produced a person ready, prepared and willing to make the loan. Where the contract is to *procure* the loan, it should appear that it was actually secured, and in such case the right of action depending upon a condition precedent, performance should be averred.¹¹

§ 188. The Rule in Some of the Other States.

In other states the second rule mentioned in § 185 prevails. "A broker who is employed to procure a loan is entitled to his commission when he procures a lender ready, willing and able to lend the money upon the terms proposed. His right to commission does not depend upon the contingency of the applicant's acceptance of the loan but upon his performance of his part of the contract. The principal cannot deprive the broker of his commission by refusing to accept the loan which the negotiations of the latter have resulted in securing. In *Green v. Lucas*, 33 L. T. (N. S.) 584, Lord Cairns said in a case very similar to the present: 'It appears to me that the plaintiff had done everything which agents in this kind of work were bound to do, and it would be forcing their liability if they were to be held answerable for what happened after. If the contracts afterwards were to go off from the caprice of the lender or from the infirmity in the title, it would be immaterial to the plaintiffs.' *Green v. Reed*, 3 F. & F. 226; *Green v. Lucas*, 31 L. T. (N. S.) 731. In principle the case of a broker negotiating a loan is the same as that of a broker negotiating a sale of property, and in the latter case it is uniformly held that the commissions are earned when a purchaser is found able and willing to buy on the terms proposed. In such cases, the

¹¹ *McLaughlin v. Whiton*, 37 Misc. 838 (N. Y. 1902). See also §§ 166-168, 172 *supra*, 191 *infra*, for failure to complete on account of defects.

broker's right to compensation is held to accrue when he has furnished a purchaser, and does not depend upon the ultimate consummation of the sale."¹²

§ 189. General Statement of Rule.¹³

In another case,¹⁴ the rule is stated thus: "The rights and duties of a broker employed to secure a loan depend upon the same principles which govern the broker who undertakes to find a purchaser of property, and no substantial distinction can be made. The inquiries in each case are, what did the broker undertake to do? has he completed his undertaking? and if not, is the difficulty and failure attributable to his own act or that of the party by whom he was employed? The loan broker is entitled to his commissions when he has procured a lender who is ready, willing and able to lend the money upon the authorized terms. This done, his duty is performed and he is entitled to compensation whether the loan is consummated or not, unless his right thereto is, by special agreement, made to depend upon conditions which the law does not annex to his engagement as a broker. He assumes no greater or different obligation in respect to title in case of a loan than when employed to make a sale. The borrower, when employing a broker to procure or make a loan for him, always does so upon the implied conditions (if there be no express stipulation in respect to the matter), that he has the ability and will make or tender to the lender a title free from infirmity. It is not the broker's duty, and no part of his engagement, to remove incumbrances, or to cure defects in title, and, if the loan is not effected in consequence of an incumbered or de-

¹² *Vinton v. Baldwin*, 88 Ind. 105, 106 (1882), (citing *Lane v. Albright*, 49 Ind. 275; *Love v. Miller*, 53 Ind. 294; 21 Am. R. 192; *Reyman v. Mosher*, 71 Ind. 596; *Moses v. Bierling*, 31 N. Y. 462; 24 Alb. Law J. 536; *Mooney v. Elder*, 56 N. Y. 238; *Hart v. Hoffman*, 44 How. Pr. 168; *Pickett v. Badger*, 1 C. B. (N. S.) 296).

¹³ See § 185 *supra*.

¹⁴ *Peet v. Sherwood*, 43 Minn. 448 (1890).

fective title, he is entitled to his commissions. He has performed his contract; the default is with the other party.”¹⁵

§ 190. Further Statement of Rule.¹⁶

In a Missouri case,¹⁷ the court thought that the same rule should apply to a loan as to a sale, but the language employed makes it somewhat difficult to determine in which rule the decision should be classed.

In the case referred to, Judge Biggs of the St. Louis Court of Appeals, wrote: “ The contract of a real estate broker for the sale of property is that he will secure and produce a purchaser who is willing, ready and able to make the purchase upon the authorized terms. * * * The same rule should govern in engagements by brokers for the negotiation of loans. It is not sufficient in such cases, that the broker has found a person who has the requisite sum of money and is willing to loan it on the security offered; but when his client is informed of this and he signifies a willingness to proceed with the business, it is then the further duty of the broker to produce the lender, *or a contract binding the latter to loan the money*, and until he does, his contract is not performed. The clause in italics expresses the views of my associates. In that I do not concur. But these latter duties become unnecessary and useless, if the borrower refuses to accept the money or revokes the authority of the broker.”

The subject is further illustrated by Fitzpatrick v. Gilson, 176 Mass. 477 (1900), in which the contention was “ that a broker who is employed ‘ to procure a loan ’ does not earn his commission unless the money to be borrowed is actually paid over, or a valid contract is made by which

¹⁵ Citing Vinton v. Baldwin, 88 Ind. 104; Holly v. Gosling, 3 E. D. Smith 262; Doty v. Miller, 43 Barb. 529; Knapp v. Wallace, 41 N. Y. 477; Gonzales v. Broad, 57 Cal. 224; Green v. Reid, 3 Frost & F. 226; Green v. Lucas, 31 Law T. (N. S.) 731; Mechem on Ag., § 970.

¹⁶ See § 185 *supra*.

¹⁷ Hackmann v. Gutweiler, 66 Mo. App. at 249 (1896).

the customer procured by the broker agrees to lend the money; and that this applies to a case where (as in the case at bar) the loan is not made because, by reason of a defect in her title, the borrower is not able to give the mortgage she stipulated to give to the customer procured by the broker." The Court said: "We are of opinion that this contention is not correct.

"The duty which a broker is employed to perform is to find a customer for that for which his principal directs him to find a customer; in the case at bar, for a loan to be made by the customer, secured by a first mortgage on a specified lot of land, to be made by the principal. The broker found a customer ready to make that loan, and the transaction fell through because the defendant, the broker's principal, did not have a good title to the land in question, that is to say, because of the principal's inability to produce that for which he employed the broker to get him a customer.

"When a broker has found a customer for that for which his principal has employed him to find a customer, the broker has performed his duty, and has earned his commission, or, as the proposition is usually stated, if the person produced by the broker is able, ready and willing to buy, sell or lend, as the case may be, the broker's commission is earned.¹⁸

"When the broker has produced a customer, his duty is at an end; so far as his rights or his duty are concerned it is immaterial whether a contract is, or is not made, or, if made, whether it is or is not performed. The broker's right to a commission is no more dependent upon or affected by the fact that a contract is, or is not, drawn up and executed, than it is by the fact that the contract, if

¹⁸ Citing *McGavock v. Woodlief*, 20 How. 221, 222; *Green v. Lucas*, 33 L. T. (N. S.) 584, 587; *Middleton v. Thompson*, 163 Penn. St. 112; *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 378, 383, 384; *Duclos v. Cunningham*, 102 N. Y. 678; *Fischer v. Bell*, 91 Ind. 243; *Vinton v. Baldwin*, 88 Ind. 104, 105; *Peet v. Sherwood*, 43 Minn. 447, 448; *Cheatham v. Yarbrough*, 90 Tenn. 77; *Budd v. Zoller*, 52 Mo. 238, 242; *Buckingham v. Harris*, 10 Col. 455.

drawn up, is, or is not carried into effect. Making or not making a contract with the customer produced, enforcing or not enforcing a contract, if made, are matters for the broker's principal to do or not to do, as his ability and inclination determine; they are matters with which the broker is not concerned and on which his right to a commission is not dependent.

“That it is no part of a broker's duty to draw up and see to the execution of a contract between his principal and the customer produced by him, is settled.”¹⁹

“That a broker's right to a commission is not defeated if a contract is made and not carried out by reason of his principal's inability to perform,” is stated in the court's opinion on the authorities given in the footnote.²⁰

§ 191. Failure to Complete on Account of Defects, etc.²¹

A broker who procures a mortgage loan as requested, is entitled to his commissions even though, on account of defects in the title to the property, the loan is not finally made.²²

Where the proposed borrower agreed that his title was free and clear of incumbrances, and the broker procured a person ready, willing and able to make the loan, but on examination of the title it developed that the same is not free and clear, and the proposed lender therefore refuses to complete the loan and advance the money, the broker is entitled to his commissions.²³

In addition to the broker's commissions, the applicant

¹⁹ Referring to *Cook v. Welch*, 9 Allen 350; *Desmond v. Stebbins*, 140 Mass. 339, 342; *Middleton v. Thompson*, 163 Penn. St. 112; *Keys v. Johnson*, 68 Penn. St. 42, 43; *Duclos v. Cunningham*, 102 N. Y. 678.

²⁰ *Green v. Lucas*, 33 L. T. (N. S.) 584; *Sweeney v. Ten Mile Oil & Gas Co.*, 130 Penn. St. 193; *Middleton v. Thompson*, 163 Penn. St. 112; *Holly v. Gosling*, 3 E. D. Smith (N. Y.) 262; *Peet v. Sherwood*, 43 Minn. 447; *Cheatham v. Yarbrough*, 90 Tenn. 79.

²¹ See § 185 *supra*.

²² *Hevia v. Lopardo*, 127 App. Div. 189 (N. Y. 1908); *Peet v. Sherwood*, 43 Minn. 448 (1890), (citing *Vinton v. Baldwin*, 88 Ind. 104; *Holly v. Gosling*, 3 E. D. Smith 262; *Doty v. Miller*, 43 Barb. 529; *Knapp v. Wallace*, 41 N. Y. 477; *Gonzales v. Broad*, 57 Cal. 224; *Green v. Reid*, 3 Frost & F. 226; *Green v. Lucas*, 31 Law T. (N. S.) 731; *Mechem on Ag.*, § 970). See also §§ 168, 172 *supra*.

²³ *Flinck v. Bauer*, 40 Misc. 218 (N. Y. 1903).

for the loan may incur further expenses, such as fees for examination of the title. In fact it has been held that when a contract provides that compensation for services in searching a title is payable, whether the title be accepted or not, the owner is liable for such services.²⁴

But where the refusal to finally make the loan was because the application for the loan incorrectly stated the width of the lot, and the broker who made out the application was aware that the owner at the time he signed the application was uncertain as to the dimensions, the broker is equally at fault with the owner in not disclosing such situation to the proposed lenders, and is not entitled to commissions.²⁵ And where the agreement is not the ordinary employment of a broker to procure a person able and willing to make a loan, but is that the principal will accept a loan from a certain company and pay the broker his commission by deducting it from the amount of the loan, the broker is not entitled to commission if the proposed lender refuses to make the loan on account of alleged defects of title.²⁶

That the broker is not a guarantor of the title offered, and broker's commissions cannot be defeated because of a defect in the principal's title, has already been shown.²⁷

§ 192. Employment and Written Authority.²⁸

There must, of course, have been an employment of the broker by the principal, either express or implied. The subject of employment is presented in another chapter.²⁹ Whether the broker's authority to negotiate a loan must be in writing or not, depends upon local statutes and ordinances and the inclination or disinclination of the courts to sustain such statutes and ordinances. The

²⁴ Title Guarantee & Trust Co. v. Stenberg, 119 App. Div. 28 (N. Y. 1907).

²⁵ Shropshire v. Frankel, 45 Misc. 616 (N. Y. 1904).

²⁶ Hess v. Eggers, 37 Misc. 845 (N. Y. 1902).

²⁷ See §§ 167, 168, 170 *supra*.

²⁸ See § 185 *supra*.

²⁹ See Ch. X *supra*.

matter has already been presented at some length.³⁰ The same is true with respect to whether or not the broker must obtain a license or pay a tax in order to carry on the vocation.³¹

Various forms of applications for loans are also given in Part VII of the present volume.³² Including the amount of the broker's commission in the statement of the expenses the borrower is to be at in obtaining the loan, does not convert a written application for a loan into a special stipulation that the broker shall not be entitled to commission in accordance with the general rule.³³

§ 193. Terms of Principal.

And, of course, the broker must procure a loan as applied for, that is, on his principal's terms.³⁴ Where, for instance, the broker was employed to obtain a loan of not less than \$220,000, but failed to secure anything better than \$210,000, and then abandoned the matter, he is not entitled to commissions when his principal subsequently takes a loan of \$200,000 from the same party.³⁵

And so, a broker employed to procure a loan for three years is not entitled to commissions for procuring a loan which was not accepted because subject to the lender's right to enforce payment on sixty days' notice in case of the passage of a law changing the rate of taxation of mortgages.³⁶ Nor where the lender insists on a "gold clause" in the mortgage.³⁷

And where the principal authorizes the broker to procure a loan so that he may pay off certain encumbrances on his property and the broker obtains an offer of a loan on the property, provided all encumbrances are paid off,

³⁰ See Ch. III *supra*.

³¹ See Ch. II *supra*.

³² See Forms 40-43 *infra*, Ch. XL.

³³ *Fitzpatrick v. Gilson*, 176 Mass. 481 (1900).

³⁴ See Ch. XII *supra*.

³⁵ *Stone v. Plant*, 96 N. Y. Suppl. 1030 (1905).

³⁶ *Kronenberger v. Teschemacher*, 52 Misc. 130 (N. Y. 1907).

³⁷ *Caston v. Quimby*, 178 Mass. 153 (1901); *Peabody v. Dewey*, 153 Ill. 657 (1894).

and no part of the loan is to be advanced until that is done, no commissions accrue.³⁸

But where the broker secures a loan, and the owner refuses to take same because he feels that the commissions claimed by the broker are excessive, he cannot afterwards justify his refusal by claiming that a new element had been introduced into the transaction by the acceptance of the loan on condition that the rules of the accepting company be complied with and the loan accepted within ten days, and that the procurement of the loan on this condition was not a fulfillment by the broker of his contract of employment.³⁹

§ 194. Recovery on Breach by Principal.⁴⁰

Where the principal refuses to accept the loan after the broker procures it upon the authorized terms, the broker is entitled to his commissions.⁴¹ When the broker, at the request of his principal, "has secured a lender ready, willing and able to make the loan on a good title the broker is entitled to his commission when, after that is done, the borrower, without any excuse, declines to complete the loan which he had engaged the broker to obtain for him and prevents the loan from being made by making the loan elsewhere."⁴²

When the broker secures the loan, he need not tender the money to his principal. When the money is secured and the principal is notified thereof, it becomes his duty to act.⁴³ Where defendant agreed to pay a broker a certain amount for procuring a loan, which the defendant refused thereafter to accept, the defendant may prove

³⁸ *West v. Stoeckel*, 10 Am. Law Rec. 308 (Cinn. 1882).

³⁹ *Hotchkiss v. Kuchler*, 86 App. Div. 265 (N. Y. 1903). See also § 170 *supra* as to right of a person to change his ground or reason.

⁴⁰ See § 185 *supra*.

⁴¹ *Steinmetz v. Pancoast*, 17 Phila. 185 (1884); *Hackmann v. Gutweller*, 66 Mo. App. 249 (1896).

⁴² *Masterson v. Knights*, 135 Ill. App. 548 (1907), (citing *Swigart v. Hawley*, 140 Ill. 186; *Springer v. Orr*, 82 Ill. App. 558).

⁴³ *Telford v. Brinkerhoff*, 45 Ill. App. 586 (1892).

that the broker had agreed to pay the lender one-half of the commission, and such one-half must be deducted in arriving at a verdict for the broker on the principle that a recovery for breach of contract must be confined to the actual loss sustained. The broker cannot derive a greater advantage from a breach than from a performance.⁴⁴

§ 195. Amount of Commissions on Loan.

The question of the amount of the commissions is taken up later.⁴⁵ There is also given in Part VII of the present volume the rates charged in the larger cities.⁴⁶ It may be also, that the amounts of commissions are regulated by statute or ordinance in particular localities, and the local statutes and ordinances should be consulted.

In New York, for instance, a statute formerly regulated the subject with respect to loans. In this state, prior to April 27, 1895, the amount of commissions on loans was restricted to fifty cents on each \$100, or, in other words, one-half of one per cent. upon the amount of the loan. Although the statute was not generally observed in real estate loan matters, yet it was enforced if insisted on by the borrower.⁴⁷ Under this statute it was said that "it may be allowable to pay for extra services not usually necessary in procuring loans, in addition to the prescribed brokerage; but it should be separated so that it may be seen whether the compensation is reasonable, or only a cover for demanding a larger commission."⁴⁸

By Chapter 467 of the Laws of 1895, loans on real estate security were excepted from the statute.⁴⁹

⁴⁴ *Flinck v. Pierce*, 53 Misc. 554 (N. Y. 1907).

⁴⁵ See Ch. XXII *infra*.

⁴⁶ See Forms 1-16 *infra*, Ch. XXXVIII.

⁴⁷ *Anderson v. Dwyer*, 61 N. Y. Suppl. 1114 (1899); *aff'd*, 63 N. Y. Suppl. 201 (1900); 30 Misc. (N. Y.) 793.

⁴⁸ *Cook v. Phillips*, 56 N. Y. 310 (1874).

⁴⁹ Vol. I, Cummings & Gilbert's General Laws, Ed. of 1901, p. 430; now § 380 of the General Business Law, which is Ch. 20 of the Cons. Laws of New York.

CHAPTER XX.

COMMISSIONS ON LEASES.

§ 196. General Statement.

In some jurisdictions it is held that the commissions on a lease procured by a broker are not earned until the lease is negotiated, or a valid contract for a lease has been executed. But a failure of the lease due to the landlord's misstatements or unreasonable requirements will not defeat the broker's claim for commissions. (§ 197.)

The general requirements for recovery of commissions for procuring a lease are the same as in the case of commissions on a sale. (§ 198.)

A tenant is not liable to the broker for commissions unless some service has been performed at his request by the broker. (§ 199.)

The broker's commission for procuring a lease is usually a percentage upon the agreed rental though sometimes a percentage on the values involved. (§ 200.) The failure of a lease does not ordinarily affect the broker's right to commissions (§ 201), as the landlord has a remedy against the tenant for unpaid rents, and the broker cannot be held responsible for the landlord's failure to collect. (§ 202.)

§ 197. When Broker's Obligations are Performed.

In regard to leases, as in the case of sales and loans,¹ there is a conflict of opinion as to when the broker is deemed to have performed his obligation. In New York it is held that where a broker undertakes to procure a

¹ See §§ 117-119, 185 *supra*.

person to take a lease of the owner's property, he cannot recover until he establishes that he has earned his commissions either by negotiating a lease or procuring the execution of a valid and binding agreement for such a lease. It is not sufficient that the parties were brought together in a negotiation, unless that negotiation ended in a lease or a valid agreement for one. This is so held in *Crombie v. Waldo*, 137 N. Y. 129 (1893), where there seems to have been nothing further than the usual undertaking of a broker in similar matters, but the court assumed that the broker entered upon an employment to procure a tenant to take a lease of the defendant's premises, and undoubtedly that is what a broker in such cases undertakes.

But in the same case² it is said that the actual execution of a lease in every case is not necessary. Thus, where real estate brokers are duly employed by a landlord and procure a tenant who agrees to every term and condition originally proposed by the landlord so that the minds of the parties meet, but no lease is signed, owing to the landlord's insistence on new and unreasonable terms, the brokers are entitled to commissions,³ and this is also so where the lease fails on account of misstatements made to the prospective tenant.⁴

In *Mears v. Jones*, 102 Me. 490 (1907), there is a dictum to the effect that to earn his commission it is enough for the broker to secure one willing to become a tenant upon the principal's terms, and bring him to the principal for acceptance as such.

§ 198. General Requirements for Recovery of Commissions.

All the usual requirements as to recovery of commis-

² *Crombie v. Waldo*, 137 N. Y. 129 (1893).

³ *Tanenbaum v. Boehm*, 126 App. Div. 731 (N. Y. 1908).

⁴ *Washburn v. Bradley*, 169 Mass. 86 (1897). See also §§ 172-174 *supra*.

sions must be met to entitle the broker to recover his commissions for negotiating a lease. He must show employment, express or implied, as well as the other essentials.⁵ A custom to the effect that where brokers negotiate a lease the owner pays the commission, cannot fasten upon a property owner any liability as the employer of a broker, simply because this owner consents to let his property to a tenant who is induced to lease it through the agency of the broker without any request, express or implied, on the part of the owner.⁶

§ 199. Liability of Tenant for Commissions.

Where a broker comes to the tenant apparently as the agent of the landlord, and after negotiations are begun, states that the landlord will pay no commissions, a promise on the tenant's part to pay the commissions is without consideration, unless there can be found either an employment of the broker by the tenant, or the performance by the broker of some service at the request, express or implied, of the tenant.⁷

§ 200. Amount of Commissions for Procuring Lease.

A subsequent chapter is devoted to a consideration of the amount of commissions.⁸ The rates charged in the larger cities appear in Part VII of the present volume.⁹ From the lists there given it will be seen that the broker's charge is usually a percentage on the agreed rental, although in some instances the charge is based on a percentage on the value of the ground, or on the appraised value of the property or otherwise. As to this latter method it was, however, said in *Daube v. Nessler*, 50 Ill.

⁵ See Ch. IX *supra*.

⁶ *Brady v. American Mach. Co.*, 86 App. Div. 269 (N. Y. 1903).

⁷ *Myers v. Dean*, 132 N. Y. 65 (1892). See also § 121 *supra*.

⁸ See Ch. XXII *infra*.

⁹ See Forms 1-16 *infra*, Ch. XXXVIII.

App. 166 (1892): "It is absurd to suppose that commissions for services in negotiating a lease can be measured by the value of the fee, regardless of the terms of the lease; the same for a term of one year as for ninety-nine."

Where the broker's commissions are, by agreement, fixed at a specified amount, there would, of course, be neither occasion nor right to resort to charging the customary rates.¹⁰ Or where, as is sometimes done, the agreement is made that the broker is to get all above a certain specified rental, the broker is entitled to nothing unless the lease he obtains provides for a sum in excess of that named, and he is, of course, entitled to all in excess of the agreed amount. Where the agreement was, "All you get above \$2,000 per year you may have as your commission," and the broker obtained a five-year lease at a rental of \$2,200 per year, the agreement was construed to mean that the broker gets nothing unless the annual rent of the tenant he secures is over \$2,000; but beyond this that he is entitled to the excess over \$2,000 per annum for the life of the lease, and not only to the excess of the first year's rental.¹¹

§ 201. Effect of Failure of Lease.

As stated in § 172, and the other sections there referred to, the failure of a customer to perform his contract does not affect the broker's commissions. In other words, when applied to procuring a lease, it means that when the landlord and the tenant produced by the broker have entered into a lease, the full commissions are earned, and the failure of the tenant to subsequently carry out the lease will not affect the broker's right to retain or recover his full commissions, unless, of course,

¹⁰ See §§ 213, 222 *infra*.

¹¹ Goldstein v. D'Arcy, 201 Mass. 312 (1909).

the landlord and the broker had agreed otherwise. Thus in *Mears v. Jones*, 102 Me. 490 (1907), the broker procured a lease for five years subject to the landlord's right to terminate the same if he meanwhile sold the property, the lease also giving the tenant the first right or option to purchase at the same figure which the landlord might be offered by any other prospective purchaser. At the end of the second year the property was sold to the tenant's wife and the question was then presented whether the broker was entitled to commissions for the three years following the sale of the property.

The court said: "The commission of a real estate broker is usually understood to be a certain percentage upon the consideration paid, or offered to be paid or received. In the case of a sale, the problem is easy. The consideration is a single amount. In the case of a lease with annual rentals for a specified term, it would be reasonable to expect that the amount of commissions would depend, in some respects, at least, upon the length of the term contracted for. It would not be natural to expect that the parties understood that so large a commission would be earned in securing a lease for one year as one for five years. And that the parties in this case understood that the commission was earned and was to become payable in annual installments, is, we think, reasonably to be inferred from the annual payments made while the lease was in force. And we agree with the plaintiff that he was entitled to annual commissions for the full term of the lease. But what was the full length of that lease? We think it was not for five seasons absolutely. It was for five seasons unless the property was sold in the meantime. It was a lease for five seasons, but determinable by a sale within that term. It was made determinable by the very lease which the plaintiff procured. He therefore did not procure a lease for full five seasons, but a lease which might lawfully end sooner. He is entitled to

his earnings for the kind of a lease he secured. He was employed to get a tenant for one or more years. The longer the term he secured, the greater the amount of rentals, and naturally the larger the amount of his commissions in the whole. He took the chances of sale. It matters not that the limitation in the lease was for the defendant's benefit, and may have been made, as it probably was, at the defendant's direction. If it was so limited at the instance of the defendant, it was just the same kind of a lease which the plaintiff undertook to procure and did procure. And the amount of the rentals which was the consideration of the lease, and which naturally would be the basis of commissions, would vary according to the length of time which should elapse before the lease was determined by sale."

§ 202. Operation of Rule as to Failure of Lease.

As a practical proposition, the rule that commissions for the full term of a lease are earned when the lease is signed, regardless of any subsequent failure on the part of the tenant, may sometimes work a hardship on the landlord, as he may have paid or be compelled to pay the broker more for his commissions than he collects rent from the tenant, should the tenant fail to pay his rent under the lease. As a legal proposition, however, the landlord has his remedy against the tenant by suit to collect the rent as it becomes due, as long as the lease runs and the property fails to bring the rental agreed on in the lease. If the tenant is financially irresponsible and judgment against him would be uncollectible, the situation is still the same. The law gives the landlord a remedy by suit, but the law does not guarantee successful collection of any judgment obtained by the remedy. Moreover, the landlord having entered into the lease with the tenant, the former is deemed to have accepted the

latter as satisfactory, and if the landlord has not satisfied himself of the financial standing of the proposed tenant before entering into the lease, he has himself to blame.¹²

Further, in some states, New York for one, if the landlord dispossesses the tenant for non-payment of rent, such dispossession puts an end to the lease unless the lease specifically provides to the contrary.¹³ And the provision in the lease to the contrary must be explicit. Having dispossessed the tenant and thus put an end to the lease, the landlord cannot recover any rent subsequently accruing, unless, as stated, the lease specifically so allows.

¹² See §§ 153-155 *supra*.

¹³ N. Y. Code of Civil Procedure, § 2253.

CHAPTER XXI.

WHO IS LIABLE FOR COMMISSIONS.

§ 203. General Statement.

As a general rule, the person who engages the broker is liable for the commissions. (§ 204.)

A mere promise to pay commissions may, under some circumstances, create no liability. (§ 205.)

Persons not owning the property may become liable for the commissions if they engage the broker. (§ 206.)

Persons acting in a representative capacity, such as trustees, executors, or guardians, engaging a broker, are personally liable for his commissions. (§ 207.)

While generally it is the vendor who pays the commissions, the purchaser may become liable therefor by special agreement or where he engages the broker to buy. (§§ 208-210.)

§ 204. The Employer is Usually Liable for Broker's Commissions.

As a general rule, the person who engages the broker is liable for the commissions if the broker brings about a sale. While, generally, the owner of the property—that is, the vendor—either himself or through an agent engages the broker, and is, therefore, liable for the commissions,¹ it is not at all necessary that the broker should show that the person he seeks to hold is the owner of the property.² In all cases, the broker must, of course, show

¹ *Downing v. Buck*, 135 Mich. 638 (1904).

² See § 206 *infra*.

that the necessary prerequisites exist which entitle him to commission.³

Where the vendor, by means of fraud, secures the broker's release of his claim for full commissions, the broker may still recover the amount, less what he has already received.⁴ Where the question is as to which of a set of brokers is entitled to the commissions, the collusion of the principal with one set of brokers to defeat the commissions of the other, is material.⁵

Where the separate owners of distinct parts of an entire tract jointly employ a broker to sell the whole tract, an action may be maintained by such broker against all jointly, but, if such contract be not proved, the suit may fail upon the general issue.⁶

§ 205. Promises to Pay Commissions.

Without an employment, or the performance by the broker of some service at the request, express or implied, of the principal, a promise by the latter to pay commissions has no consideration for its support, and no liability to pay is created by it.⁷ And even where the owner actually promises to pay the broker commissions, under the belief that the broker was the procuring cause of the sale, he may nevertheless resist payment, and successfully too, if in fact the broker was not the procuring cause.⁸

An admission by the owner that the broker is entitled to a commission may be considered as evidence.⁹ And acknowledging in the contract an indebtedness to the broker to the amount of his customary commission may be taken as an admission that the sale was effected

³ See Ch. IX, *supra*.

⁴ *Bowe v. Gage*, 112 N. W. 469 (Wis. 1907); 12 L. R. A. (N. S.) 265.

⁵ *Haven v. Tarter*, 124 Mo. App. 691 (1907). See also §§ 97, 98 *supra*.

⁶ *McGill v. Pressley*, 62 Ind. 193 (1878).

⁷ *Myers v. Dean*, 132 N. Y. 71, 72 (1892).

⁸ *Bellesheim v. Palm*, 54 App. Div. 77 (N. Y. 1900). As to consideration for promise to pay broker though he is not successful, see *Kimmel v. Skelly*, 130 Cal. 555 (1900).

⁹ *Metcalfe v. Gordon*, 86 App. Div. 370 (N. Y. 1903).

through the agency of the broker.¹⁰ But a clause in the contract between vendor and vendee as to how and by whom the commission is to be paid, is not a contract with the broker for the payment of the commission.¹¹ And where the promise to pay commission is made after the sale is already consummated there is said to be no consideration for the promise.¹² And so it has been said in New Jersey that in the absence of a written contract of employment, as required by the New Jersey statute, a subsequent promise to pay commission is without consideration.¹³

“By a written contract for the sale of real estate the vendee agreed ‘to pay all commissions or brokerage arising by reason of the sale of said property.’ The title proved defective, and the contract was never performed. In an action against the vendee for commissions plaintiff alleged that the vendor employed him to sell the property on condition that the vendee should pay the commission, and that defendant, with knowledge of this fact, agreed to pay plaintiff’s commission. Held, that plaintiff had no cause of action on the contract between the vendor and vendee; he could only recover on defendant’s oral agreement with him; and testimony was admissible that defendant agreed to pay his commission only if the title proved good.”¹⁴

§ 206. Liability of Persons Not Owning the Property.

The fact that the party who employs the broker is not the owner of the property does not relieve him from liability for broker’s commissions.¹⁵ “It is matter of common knowledge that in the business world men do

¹⁰ Redfield v. Tegg, 38 N. Y. 214 (1868).

¹¹ Barber v. Hildebrand, 42 Nebr. 405 (1894).

¹² Wolverton v. Tuttle, 94 Pac. 963 (Ore. 1908).

¹³ Leimbach v. Regner, 70 N. J. L. 609, 610 (1904).

¹⁴ Headnote in Bab v. Hirschbein, 12 N. Y. Suppl. 730 (1891). See also § 209 *infra*.

¹⁵ Sanchez v. Yorba, 97 Pac. 205 (Cal. 1908).

frequently obtain what are termed options upon real property—that is to say, the right to purchase, and then employ brokers to negotiate a sale at an enhanced price, the title being all the while in others. * * * A may possess such knowledge as justifies him in his judgment in contracting to sell, or in contracting with a broker to sell for him, or to find a purchaser for property which he does not own. If he does so, without so guarding his agreement as to save himself in case of failure to secure title to the thing he has authorized to be sold, he cannot be heard to complain of the result of his own folly or lack of foresight.”¹⁶

A broker is not required to search his customer's title to the property, but may assume that the customer's title thereto is perfect. He relies upon his employment, and his only duty is to comply with the terms thereof by producing a purchaser ready, willing and able to take the property upon the vendor's terms.¹⁷ Where title is in the wife, and the husband puts the property in the broker's hands for sale without disclosing the fact that he is acting as agent for his wife, the husband may be held for the commission.¹⁸ This is on the ground stated, that a person may become liable to the broker for his commission even though that person is not the owner of the property.

If a person places property in the hands of a broker for sale, and employs the broker to sell it without at the same time stating that he is not really the owner but only acting for the owner, that person becomes liable for the commission, even though the broker afterwards discovers that the person was only acting for the owner. Thus in *Whiting v. Saunders*, 23 Misc. 332 (N. Y. 1898), the wife of the defendant Saunders owned the property. The de-

¹⁶ *Martin v. Ede*, 103 Cal. 161 (1894).

¹⁷ *Harrell v. Veith*, 13 N. Y. St. Rep. 738 (1888). See Chap. XI, §§ 117-119 *supra*, as to conflict of opinion as to when the broker's obligation is performed.

¹⁸ *Jarvis v. Schaefer*, 105 N. Y. 289 (1887); *Bounds v. Alee*, 116 Iowa 345 (1902).

fendant placed it in the plaintiff's hands, a broker, for sale. There was some dispute as to whether the defendant told the broker at the time that his wife owned the property. The broker drew the contract when he secured a purchaser, and the contract appears to have been drawn "Thorndike Saunders, attorney for Emma Saunders, party of the second part," and it was claimed that this was evidence that the broker knew that Saunders was acting for his wife. In the lower court the jury had returned a verdict for the broker against Saunders on this conflicting proof.

In affirming this judgment, the court (Appellate Term of the Supreme Court) said in part: "There can be no doubt that plaintiffs were aware of defendant's agency before the contract of exchange or sale between Mrs. Saunders and Mrs. Boschen, by their attorneys, was executed or even drawn up; but we are of opinion that there is some evidence tending to show that plaintiffs did not know of defendant's agency until after they had undertaken the employment of finding a purchaser and had brought the transaction, practically, to a close. The subsequent disclosure of the principal came too late, for a person, contracting as agent, will be personally responsible, where, at the time of making the contract (of brokerage), he does not disclose the fact of his agency but treats with the other party as being himself the principal; for in such case it follows, irresistibly, that credit is given to him on account of the contract. He must disclose the fact that he is acting only as agent, in order that the other party may determine whether he will accept the responsibility of the principal in the transaction. See *Ashner v. Abenheim*, 19 Misc. 288; *Story Ag.*, § 266."

When a husband acts for his wife in the management or disposition of her property, and when his action naturally tends to accomplish her known wishes in regard to it, it needs but little evidence to warrant an inference

that the action was authorized by her.¹⁹ "A wife may act as the agent of her husband, and if he permits her so to act in any particular transaction, he adopts and is bound by her acts and admissions, and they may be given in evidence against him; and a subsequent acknowledgment or ratification of her acts by the husband must be * * * evidence of and equivalent to an original authority."²⁰

§ 207. Trustees, Executors and Guardians.

A person acting in a representative capacity, such as trustee, executor or guardian, is personally liable for the broker's commission.²¹ As stated in *Hickman v. Leggett*, 100 Pac. 1072 (Cal. 1909), "It is well settled that an executor or administrator cannot create any liability against the estate in his charge by his employment of attorneys, brokers or others to assist him in the performance of his duties. The attorney, broker, or other person employed has no action or claim against the estate. Whatever claim he has, whether it be absolute or conditional, is against the executor or administrator in his individual capacity, who, in turn may, if the expenditure was made in good faith and was proper, be credited therewith in the settlement of his accounts with the estate."

One of two trustees who employs a broker to find a purchaser for the trust real estate, is liable in his individual capacity upon the contract of employment, and the other trustee need not be made a party defendant.²² Where an executor employs the broker, the executor is

¹⁹ *Simes v. Rockwell*, 156 Mass. 372 (1892).

²⁰ *Hopkins v. Mollinieux*, 4 Wend. 465 (N. Y. 1830).

²¹ *McGovern v. Bennett*, 146 Mich. 562 (1906). (citing *Packard v. Kingman*, 109 Mich. 497; *Lathrop v. Duffield*, 134 Mich. 485; *Jones v. Dawson*, 19 Ala. 672; *Johnson v. Leman*, 131 Ill. 609; 7 L. R. A. 656; *Truesdale v. Ins. Co.*, 63 Minn. 49; *Mitchell v. Whitlock*, 121 N. C. 166; *Worrall v. Harford*, 8 Ves. 4; *Strickland v. Symons*, L. R. 26 Chan. Div. 245; 3 Pomeroy on Eq. Jurs., § 1085).

²² *Diamond v. Wheeler*, 80 App. Div. 58 (N. Y. 1903).

individually liable for his commission.²³ Where it is sought to hold persons liable as executors, there should be proof that they had power of sale, and in the absence of proof that they could act otherwise than jointly, an employment of a broker by one of several executors does not bind the others.²⁴ A guardian is personally liable for broker's commissions.²⁵

§ 208. Commissions from Purchaser.

In the usual course of business, it is the seller and not the purchaser who pays the commission,²⁶ and to charge the purchaser with liability requires satisfactory proof of a special contract to that effect,²⁷ or it may arise from the fact that the purchaser employed the broker to find the property, as distinguished from the cases in which the broker is engaged by the vendor to sell the property.

Special contracts by which the purchaser undertakes the payment of commission are not unusual. Where in such a case *the vendee* by the contract of sale *agreed with the vendor* to pay the broker's commissions, it is said that the assumption to pay was based upon the vendor's compliance with the terms of the contract and his transfer of the title to the premises, and if the contract falls short of being performed, as where the court decided that the vendor's title was defective, the obligation imposed by the assumption falls with it in so far as the vendee is concerned.²⁸

This determines the question, however, merely between vendor and vendee. The broker would still have

²³ Pollatschek v. Goodwin, 17 Misc. 591 (N. Y. 1896). See also Wilson v. Mason, 158 Ill. 312 (1895).

²⁴ Guthmann v. Meyer, 31 Misc. 810 (N. Y. 1900). And as to the power to purchase and invest, see Wilson v. Mason, 158 Ill. 312, 313 (1895). As to liability of executor, as such or individually, on employment of broker to procure a mortgage loan on the estate property, see McMahon v. Smith, 136 App. Div. 839 (N. Y. 1910).

²⁵ Myers v. Cohen, 4 Misc. 185 (N. Y. 1893), (citing Douglass v. Leonard, 44 St. Rep. 293; Johnson v. Leman, 19 Am. St. 67).

²⁶ Downing v. Buck, 135 Mich. 638 (1904).

²⁷ Freeman v. Polstein, 49 Misc. 644 (N. Y. 1906).

²⁸ Eckel v. Spitzer, 58 Misc. 467 (N. Y. 1908). See also § 205 *supra*.

his remedy against the vendor, unless he had unconditionally released the vendor and agreed to look to the vendee alone for his commissions, which would raise the question whether a novation had been created.

§ 209. Purchaser's Promise to Pay Commission.

Where the property is given to an agent to sell, and he proposes it to a buyer, and the latter requests the broker to do nothing further but to permit the purchaser to deal directly with the owner, and promises to pay the broker a commission if he buys the property, the purchaser is liable for the commission if he buys the property. Such an agreement does not imply bad faith on the broker's part, if all the terms are fixed and the broker has no discretion.²⁹

And when the broker, upon request of the owner, initiates the negotiation which eventuates in the sale, but subsequently remains silent upon the promise of the purchaser to pay his commission in full, thereby inducing the owner to rely upon the purchaser's certification that there was no broker's commission, and to fix the purchase price accordingly, it furnishes a consideration for the purchaser's promise to pay the commissions.³⁰

Where the seller refuses to sell unless the broker waives any claim against him for commission, and the vendee then promises to pay the broker if he waives all claim against the seller, the vendee is liable for the promised amount, and this irrespective of whether the broker had a valid claim for commission against the vendor.³¹

And where the vendor released the vendee from his contract of purchase, a promise by the latter in such event to pay the broker's commissions which the vendor

²⁹ *Stiegel v. Rosenzweig*, 129 App. Div. 547 (N. Y. 1909). See also Ch. XIII, *supra*, as to good faith of broker.

³⁰ *Abraham v. Goldberg*, 6 Misc. 43 (N. Y. 1893).

³¹ *Cole v. Mendenhall*, 117 App. Div. 786 (N. Y. 1907).

had incurred, is founded upon a sufficient consideration. And it seems this is so whether or not the contract from which the purchaser was released would have been enforceable.³² If a proposed purchaser promises to pay the commission in case he purchases, because the vendor would pay no commission, and the property is subsequently sold to a third party who in turn sells to the proposed purchaser, the question whether the commission was earned should be submitted to the jury.³³

§ 210. Broker Employed by Purchaser.

Where a real estate broker is employed to buy real estate, he earns his commission when he has in good faith brought to his employer a seller who makes a written contract with him for the sale of the property, and it is no answer to his claim for commission against such employer, that the seller could not make perfect title, and was therefore unable to carry out his contract of sale.³⁴ Likewise, where the broker is employed by the purchaser, but with the understanding that he should receive his pay from the vendor, a refusal on the purchaser's part to comply with the contract to purchase, by reason of which the broker is deprived of his commissions, renders the intending purchaser liable for the damages thereby inflicted on the broker.³⁵

"It would seem to be immaterial whether in the original negotiation or the sale the plaintiff (the broker) was the agent of the vendor or the purchaser. The complaint here is for the violation of the contract to purchase, from which violation damages directly result to plaintiff."³⁶ Where a person agrees to pay a broker

³² *Brown v. Jennett*, 106 N. W. 747 (Iowa 1906); s. c., 5 L. R. A. (N. S.) 725. See also § 205 *supra*.

³³ *Mutchnick v. Friedman*, 135 App. Div. 356 (N. Y. 1909).

³⁴ *Knapp v. Wallace*, 41 N. Y. 477 (1869).

³⁵ *Livermore v. Crane*, 26 Wash. 529; 57 L. R. A. 401 (1901). (citing *Bishop v. Averill*, 17 Wash. 209; 49 Pac. 237; 50 Pac. 1024; *Cavendar v. Waddingham*, 2 Mo. App. 551; *Atkinson v. Pack*, 114 N. C. 597; 19 S. E. 628).

³⁶ *Livermore v. Crane*, *supra*.

a commission if he succeeds in getting an owner to sell to the purchaser at a price named, and the broker succeeds in so doing, he is entitled to his commission from the proposed purchaser,³⁷ notwithstanding the purchaser refuses to take the property because he is unable to get a reduction in the price.³⁸

The fact that a purchaser who employed a broker to negotiate a sale for him, takes the contract and the deed in his wife's name, does not, of itself, deprive the broker of his compensation. Whether he is to be treated as the actual purchaser or, as agent for his wife, an undisclosed principal, the question of his liability is for the jury and not for the court.³⁹

³⁷ *Brunson v. Blair*, 97 S. W. 337 (Tex. 1906).

³⁸ *Michaelis v. Roffmann*, 37 Misc. 830 (N. Y. 1902).

³⁹ *Bloch v. Lowe*, 51 Misc. S (N. Y. 1906).

CHAPTER XXII.

AMOUNT OF COMPENSATION.

§ 211. General Statement.

Where the amount of commissions is expressly agreed upon, the broker is entitled to the agreed amount. (§§ 212-218.) Where no rate or special mode of compensation has been agreed on, the broker is entitled to the customary rate. (§ 219.)

A custom or usage, when it is reasonable, uniform, well settled and not contradictory to fixed rules of law or the express terms of the agreement, is generally deemed to form a part of the contract. (§§ 219, 220.) A custom, to bind the parties, must either be known to them or must be so general that they must be supposed to have contracted with reference to it. (§§ 221, 222.) A custom may be established by presumptive as well as by direct evidence. (§§ 223, 224.) Rules of real estate boards are binding upon members but not upon non-members, unless such rules are established as a custom. (§ 225.)

In the absence of an agreed amount, or of a custom fixing the rate, the broker is entitled to the fair value of his services. (§ 226.)

§ 212. Commissions. How Fixed.

The amount of the broker's compensation is fixed by (1) express agreement of the parties; (2) custom; or (3) by the reasonable value of his services.¹

¹ *Knaus v. K. B. Co.*, 142 N. Y. 77 (1894); *Walker Mfg. Co. v. Knox*, 136 Fed. 339 (1905); *Jones v. Moore*, 30 Ky. Law Rep. 605 (1907).

§ 213. Agreed Compensation.

Sometimes brokers name a fixed amount as their compensation. When this is done and agreed to by the broker's employer, it constitutes an express agreement. An express agreement, however, need not necessarily specify a fixed sum. It is an express agreement if the broker and his employer agree that the broker shall have as his compensation all in excess of a fixed sale price,² or that the broker shall have a certain part of the "profits" on a sale. When the broker has an express agreement as to his compensation, such agreement controls in case the broker brings about a deal. Such situations are governed by the rules applicable to all contracts. Where there is a valid express contract, there is no place for recovery on a *quantum meruit*.³

Where on buying property the principal agreed to pay the broker a part of the profits when he sold, and no time for a sale was fixed, it was held that the principal or his representatives could not refuse absolutely to sell; that a sale must be made within a reasonable time, and that after repudiation of the broker's rights he was entitled to recover his part of the "profits" in cash, based upon the then *value* of the land, less the amounts which would be properly chargeable against a sale price before the net profit could be arrived at.⁴

§ 214. Measure of Compensation.

Where the seller causes a breach of the contract of employment and the broker is entitled to damages on account thereof, the measure of damages is either the commission agreed upon, or reasonable compensation for the

² See §§ 215-218 *infra*.

³ *Reams v. Wilson*, 147 N. C. 304 (1908), (citing *Reed v. Reed*, 82 Pa. St. 420; *Phelan v. Gardner*, 43 Cal. 306; *Doty v. Miller*, 43 Barb. 529; *Bailey v. Chapman*, 41 Mo. 537; *Monroe v. Snow*, 131 Ill. 136; *Breckenridge v. Claridge*, 43 L. R. A. 593).

⁴ *Kauffman v. Baillie*, 89 Pac. 548 (Wash. 1907).

broker's services.⁵ And it has been held that where a broker contracted to sell land at a specified price for an agreed commission of five per cent., but a sale was made to the broker's purchaser by the principal for less than the price specified in the agreement, the broker was not entitled to recover the agreed commission but was only entitled to receive reasonable compensation.⁶

A broker may also in effect, by his conduct or otherwise, waive his right to commissions which he has earned. As an illustration,—where a certain amount is agreed upon as commission in case a sale is made, and the broker makes the sale but his principal refuses to complete, the commissions are earned, but if the broker thereafter makes efforts to again sell the property for his principal without demanding the commissions already earned, the broker on making a subsequent sale is not entitled to commissions for the first sale but only on the second.⁷

§ 215. All in Excess of Fixed Price.

It is not unusual for persons to list property with brokers and fix a net sale price, the brokers to retain as their compensation all they can secure in excess of this net price. When such an arrangement is entered into, it should not be allowed to rest on a mere understanding or oral agreement between the owner and the broker. On the contrary, an explicit agreement should be entered into, showing conclusively that the broker *is to receive for his compensation* all he gets above a certain price, as distinguished from the not uncommon arrangement under which a broker is *merely authorized* to sell at a price not less than a fixed sum. The difference, which is material, is discussed in the following section.

⁵ Dal v. Fischer, 107 N. W. 534 (S. D. 1906).

⁶ Schultz v. Zelman, 111 S. W. 776 (Tex. 1908).

⁷ Deford v. Shepard, 6 Kans. App. 428 (1897).

§ 216. Agreements for All in Excess of Fixed Price.

Commission agreements for "all in excess of a fixed price" should, as stated, be as explicit as possible. Losses to the broker or to the vendor may result from disregard of this caution.

If the intention is to permit the broker to have all in excess of a fixed sale price as his compensation, and this is not clearly expressed, the courts may adopt a construction of the agreement quite fatal to the broker. For example, in an Arkansas case where the owner of land authorized a broker to sell her property at "\$3 per acre net to her," it was held that this would not entitle the broker to all he could get in excess of the specified amount, but that it meant that the land must bring to the owner \$3 per acre over and above all expenses and deductions; that the specification of the amount was only a limitation of the broker's power to sell; that it was still his duty to sell the land for the highest price obtainable and to account to the owner for the proceeds, less a compensation *not greater than the excess of the purchase money over \$3 per acre net, and at the same time not exceeding a reasonable compensation.*⁸

The same ruling has been applied in other jurisdictions. Thus, where property was listed with a broker at a fixed sum net to the vendor, the intention was held to be that the property should bring him the fixed amount free of all expenses, and not that the brokers should receive as compensation all the purchase money above the fixed sum. In this case,⁹ the court said: "We do not mean to hold that if the real estate brokers who are plaintiffs in this case had alleged an express contract that * * * they might have as compensation for their services all that they might sell the property for, above

⁸ *Boysen v. Robertson*, 70 Ark. 56 (1902); s. c., 68 S. W. 243.

⁹ *Matheney v. Godin*, 130 Ga. 713 (1908), (citing *Turnley v. Michael*, 15 S. W. (Tex.) 912).

a fixed sum, they would not be entitled to such excess as compensation for their services, in case they procured a purchaser. But where the owner agrees with brokers for them to sell property for a named amount 'net to him' such language will not be held to import by implication a contract to allow the brokers, as a fee or profit, all of the purchase price in excess of the sum so named."

On the other hand, if it is merely intended to give the broker a net price which is to be the lowest selling price, it is equally fatal to the land owner if the language used may be construed to mean that the broker may retain as his compensation all above the net price. Agreements of the latter nature are, as already said, legitimate, and as will be seen, enforced. The intention should therefore be expressed so clearly that no adverse construction is possible.

§ 217. Rule as to All in Excess of Fixed Price.

Where the broker is given a net sale price, and is to retain for his compensation all he may secure in excess of such net price, he is not, of course, entitled to compensation if he brings about a sale for a price only equal to or less than the net price. Thus, where the vendor agrees to take a stated amount "net," all above such amount to belong to the broker for his commission, the broker can claim no commission from the vendor where he procured a purchaser for the net amount only.¹⁰

On the other hand, he may legally claim all he secures in excess of such net price. "When lands are placed in the hands of a broker for sale at a net price to the owner, with the understanding that his commission or compensation depends entirely upon what he may be able to get for the land over and above the net price to the owner, he is entitled to the excess for which he sells."¹¹

¹⁰ *Wolverton v. Tuttle*, 94 Pac. 963 (Ore. 1908). See also § 232 *infra*.

¹¹ *Jeffries v. Robbins*, 66 Kans. 436 (1903).

In other words, where the broker is to receive for his commission all in excess of a fixed price, he can claim commissions only in the event he procures a purchaser at a price in excess of the fixed amount; the excess being the measure of his commission.¹²

Where the broker is to get all or a part of all above a certain price per acre or a certain price in gross, the amount of the mortgage on the property purchased should be considered a part of the price paid when arriving at the net amount received by the seller, and upon which the commissions are to be computed, at least it has been so held where nothing was said about any mortgage in the written employment of the broker.¹³

§ 218. Rule as to All in Excess of Fixed Price when Vendor Intervenes.

When the broker is to sell for a net price and keep the excess and secures a purchaser at a price in excess of the net price, and the owner sells to the purchaser, knowing him to be the broker's client, the owner is liable to the broker for a commission equal to the difference between the net price and the price the purchaser was ready, willing and able to pay to the agent for the property.¹⁴

If the broker's purchaser to whom the vendor sells the property, in fact agreed to pay more than the fixed amount, and the vendor is informed of that fact before completing the sale, and he takes a less sum, the vendor is liable.¹⁵

Where an owner agreed to give the broker all above \$1,400 obtained for his property, and also agreed not to

¹² *Holcomb v. Stafford*, 102 Minn. 233 (1907), (citing *Antisdell v. Canfield*, 119 Mich. 229; 77 N. W. 944; *Beatty v. Bussell*, 41 Nebr. 321; 59 N. W. 919; *Ames v. Lamont*, 107 Wis. 531; 83 N. W. 780). See also *Beaumont v. Samson*, 90 Pac. 839 (Cal. 1907).

¹³ *Hobart v. Stewart*, 99 Minn. 394 (1906).

¹⁴ *Church v. Dunham*, 14 Idaho 776 (1908).

¹⁵ *Holcomb v. Stafford*, 102 Minn. 233 (1907).

sell the property without giving the broker notice, and the broker brought a customer for \$1,500 and learned, it then being February, that the owner had sold the property in January for \$1,350 without notice to the broker, it was held that this being a valid express contract, there was no place for a recovery on *quantum meruit*, and that the broker was entitled to recover the stipulated compensation amounting to \$100.¹⁶

§ 219. Compensation in Absence of Agreement.

“Where a broker has been employed and no rate or special mode of compensation has been agreed on, the customary rate forms the proper rule of value for his services.”¹⁷ Under such circumstances he is entitled to a reasonable compensation, evidence of which is the usual and customary charge for making such sale.¹⁸

It is not unusual for brokers to say nothing at all about the amount of their compensation when the property is placed with them for the purpose of selling or renting it. In such case, unless a fixed compensation is subsequently agreed upon, the broker relies on recovering the “customary” compensation. This customary rate may vary in different localities.¹⁹ Where no price is fixed and the broker is merely instructed to get an offer, the implied agreement is that the owner will pay commissions upon the sale price in the event the owner agrees upon a figure and sells to some person introduced by the broker.²⁰

But it seems that in an exchange where the values of both properties have been purposely inflated, the

¹⁶ Reams v. Wilson, 147 N. C. 305 (1908), (citing Reed v. Reed, 82 Pa. St. 420; Phelan v. Gardner, 43 Cal. 306; Doty v. Miller, 43 Barb. 529; Bailey v. Chapman, 41 Mo. 537; Monroe v. Snow, 131 Ill. 136; Brackenridge v. Claridge, 43 L. R. A. 593).

¹⁷ Erben v. Lorillard, 2 Keyes 572 (N. Y. Court of Appeals, 1866); Monroe v. Snow, 131 Ill. 136 (1890).

¹⁸ Jones v. Moore, 30 Ky. Law Rep. 605 (1907).

¹⁹ See Schedules of Rates, Forms 1-16 *infra*, Part VIII.

²⁰ Martin v. Fegan, 95 App. Div. 157 (N. Y. 1904).

broker's percentage should be based on the real value of the property.²¹

§ 220. Custom as Part of the Agreement.

Parties are presumed to contract in reference to the custom or usage of the particular place or trade in or as to which they enter into agreement, when the custom or usage is so far established, and so far known to the parties that it must be supposed that their contract was made in reference to it.²²

"Custom or usage relating to a particular business in order to be available for the purpose of determining the rights of the parties must be uniform, notorious and reasonable."²³ Every legal contract is to be interpreted in accordance with the intention of the parties making it. A custom or usage when it is reasonable, uniform, well settled, not in opposition to fixed rules of law, not in contradiction of the express terms of the contract, is generally deemed to form a part of the contract, and to enter into the intention of the parties.²⁴

In *Heistand v. Bateman*, 41 Colo. 23 (1907), it was said: "Evidence of custom may be resorted to for the purpose of ascertaining the meaning and intent of parties to a contract where the terms employed are general in their nature. Experience has taught that men of affairs, in making contracts, are not always careful to express themselves with completeness and particularity, and that in dealing with one another, they leave part of their intention unexpressed, in silent reliance on the usages mutually understood, to enter into and form a part of their agreement."²⁵ Hence, it follows, that when such a con-

²¹ *Porter v. Hellingsworth*, 30 Misc. 628 (N. Y. 1900); 62 N. Y. Suppl. 796.

²² *Walls v. Bailey*, 49 N. Y. 469 (1872); *Steidtman v. Lay Co.*, 234 Ill. 84 (1908).

²³ *Heistand v. Bateman*, 41 Colo. 22 (1907), (citing *Savage v. Pelton*, 1 Colo. App. 148; *Leach v. Perkins*, 17 Me. 462).

²⁴ *Walls v. Bailey*, 49 N. Y. 469 (1872).

²⁵ Citing 29 Am. & Eng. Enc. Law (2d Ed.), 422.

tract becomes the subject of litigation, the presumption is indulged, if the parties have not expressed a contrary intention, that they intended to incorporate therein a usage known to them, and evidence of such is admissible, not to vary or contradict the terms of the contract, but to interpret it, as it was understood by the parties at the time it was made.”²⁶

A custom that where brokers negotiate a lease the owner pays the commission, cannot fasten upon a property owner any liability as the employer of a broker simply because he consents to rent his property to some one who is induced to lease it through the agency of the broker without any request, express or implied, on the part of the owner.²⁷

A custom between brokers to divide commissions, gives no right of recovery in the absence of an agreement to divide or of facts from which such agreement may be implied.²⁸

§ 221. Custom and Usage Defined.

“Strictly speaking, *custom* is that length of *usage* which has become law. It is a usage which has acquired the force of law.”²⁹ The words “custom” and “usage” are often used as convertible terms.³⁰

§ 222. When Custom Binds the Parties.

“A custom or usage which binds the parties to a contract does so only upon the principle either that they have knowledge of its existence or that it is so general that they must be supposed to have contracted with reference to it.”³¹ Where a usage is local, its existence

²⁶ Citing 29 Am. & Eng. Enc. Law (2d Ed.), 423, *et seq.*

²⁷ *Brady v. American Mach. Co.*, 86 App. Div. 269 (N. Y. 1903).

²⁸ *Hedenberg v. Seeberger*, 140 Ill. App. 618 (1908).

²⁹ *Wells v. Bailey*, 49 N. Y. 471 (1872).

³⁰ *Id.*, 472.

³¹ *Harris v. Tumbridge*, 83 N. Y. 92, 100 (1880).

must be clearly proved to have been known to the party sought to be charged thereby, at the time.³² Not only the existence of a usage, but whether knowledge of it exists in any particular case is a question of fact for the jury.³³ Evidence of usage is received as is any other parol evidence, when a written contract is under consideration.³⁴ Some cases hold that the custom may be proved without being pleaded.³⁵

Where there is an express contract as to the amount of compensation, and the contract is not vague or uncertain, it cannot be altered or affected by any proof of usage, and proof of custom in such a case is therefore inadmissible.³⁶ In other words, where the contract covers the point involved, proof of custom as to such point is not proper.³⁷

It has been said that where a person brings about a sale and attempts to recover commissions at the rate usually charged by brokers, he must show that he himself is a broker.³⁸ In another case,³⁹ it was said that "in an action for reasonable compensation by one employed to sell real estate, and who effects a sale, but who is not regularly engaged in that business, evidence of the customary charges of real estate agents for such services is relevant; but such customary charges are not conclusive in fixing the compensation of the person making such sale in such circumstances."⁴⁰

Again, in the same case⁴¹ it was held that, "The right of one rendering services for another to have their value estimated under a *quantum meruit* upon a basis of com-

³² Higgins v. Moore, 34 N. Y. 425 (1866).

³³ Walls v. Bailey, 49 N. Y. 476 (1872).

³⁴ *Id.*, 470.

³⁵ Steidtmann v. Lay Co., 234 Ill. 89 (1908). As to pleading custom, see Poland v. Hollander, 62 Misc. 523 (N. Y. 1909).

³⁶ Main v. Eagle, 1 E. D. Smith 619 (N. Y. 1852); Goldstein v. D'Arcy, 201 Mass. 312 (1909).

³⁷ Emery v. Atlanta Exch., 88 Ga. 326, 330 (1891), (citing Gibney v. Curtis, 61 Md. 192; Corbett v. Underwood, 83 Ill. 324; Werner v. Footman, 54 Ga. 128).

³⁸ Main v. Eagle, 1 E. D. Smith 619 (N. Y. 1852).

³⁹ Fleming v. Wells, 101 Pac. 66 (Colo. 1909).

⁴⁰ Citing Kennerly v. Sommerville, 64 Mo. App. 75; Erben v. Lorillard, 41 N. Y. 567; 3 Sutherland on Damages (3rd Ed.), 451.

⁴¹ Fleming v. Wells, 101 Pac. 66 (Colo. 1909).

missions can only arise out of a general custom, so that, where such custom exists in reference to certain kinds of business, any one actually or presumptively having knowledge of it, and employing the persons engaged in such business to perform services in their line without special contract, will be presumed to have done so with reference to such custom; but this rule only obtains where the persons employed are regularly engaged in the business to be transacted.⁴² Plaintiff was not engaged in the real estate business, so it cannot be assumed that defendants' promise to recompense her for the services she rendered was made with reference to, or upon the basis of, commissions usually charged by real estate brokers. In such circumstances she would only be entitled to recover what her services might reasonably be worth independent of the question of the usual commissions charged by brokers, although evidence of the customary commissions charged by real estate agents would be relevant to consider in fixing the value of her services."

§ 223. Ignorance of Custom.

As we have seen, custom is a usage which has acquired the force of law⁴³ and ignorance of the law will not excuse. "A general custom is the common law itself, or part of it." Such a general custom for instance, as days of grace on a note (now abolished in some states) so pervaded the whole commercial world that it was universally understood to enter into every note. In such a case a party would not be heard to say that he was ignorant of the custom.⁴⁴

"Doubtless if a custom is ancient, very general and well known, it will often be a presumption of law that the party had knowledge of it.⁴⁵ It would seem, how-

⁴² Citing *Dyer v. Sutherland*, 75 Ill. 583.

⁴³ § 221 *supra*.

⁴⁴ *Walls v. Bailey*, 49 N. Y. 472 (1872).

⁴⁵ See *Steidtman v. Lay Co.*, 234 Ill. 89 (1908).

ever, that upon principle, for a party to be bound by a local usage, or a usage of a particular trade or profession, he must be shown to have *knowledge* or *notice* of its existence. * * * Usage is engrafted upon a contract or invoked to give it a meaning, on the assumption that the parties contracted in reference to it; that is to say, that it was their intention that it should be a part of their contract wherever their contract in that regard was silent or obscure. * * * No usage is admissible to influence the construction of a contract unless it appears that it be so well settled, so uniformly acted upon and so long continued as to raise a fair presumption that it was known to both contracting parties, and that they contracted in reference thereto. There must be some proof that the contract had reference to it, or proof arising out of the position of the parties, their knowledge of the course of business, their knowledge of the usage, or other circumstance from which it may be inferred or presumed that they had reference to it.”⁴⁶

“The principle governing particular customs or trade usages is as follows: ‘The elements of antiquity need not be shown in the case of a usage or custom of trades. All that is required is to show that it is established, that is, that it has existed a sufficient length of time to have become generally known.’ ‘Particular usages and customs of trade or business must be known by the party to be affected by them, or they will not be binding, unless they are so notorious, universal and well established that his knowledge of them will be conclusively presumed.’ ”⁴⁷

§ 224. Proof of Custom.

Proof of the custom is admissible on the theory that it explains an ambiguity in the agreement.⁴⁸ In Atkin-

⁴⁶ Walls v. Bailey, 49 N. Y. 473, 474, 476 (1872). See § 224 *infra*, as to proof of custom.

⁴⁷ Arkadelphia Lbr. Co. v. Henderson, 84 Ark. 389 (1907), (citing 12 Cyc. 1034, 1041; and Arkansas cases).

⁴⁸ Walls v. Bailey, 49 N. Y. 468 (1872).

son v. Truesdell, 127 N. Y. 234 (1891), the rule is stated that "parol evidence may be given as to the uniform, continuous and well-settled usage and custom pertaining to the matters embraced in the contract, unless such usage and custom contravene a rule of law,⁴⁹ or alter or contradict the expressed or implied terms of a contract free from ambiguity."

A custom is "to be established or negatived in all its essentials as well as to knowledge as to any other, by the same character and weight of evidence as are necessary to maintain other allegations of fact. It may be established by presumptive as well as by direct evidence. Nor, on the other hand, is it exempt from the difficulty that a presumption may not prevail against direct evidence to the contrary of it. The jury may presume, from all the circumstances of the case, that knowledge or notice existed." As for instance, that the usage existed for many years, that the party resided at the place where the custom existed, or that the party was himself of the trade or profession in which the custom existed.⁵⁰

"It is for the jury then, under proper instructions from the court, to take all the evidence in the case; that as to the existence, duration and other characteristics of the custom or usage, and that as to the knowledge thereof of the parties; and therefrom to determine whether there is shown a custom of such age and character, as that the presumption of law will arise that the parties knew of, and contracted in reference to it, or whether the usage is so local and particular, as that knowledge in the party to be charged must be shown affirmatively or may be negatived."⁵¹

A single act or transaction is not enough to warrant the inference that such act or transaction is customary.

⁴⁹ A custom contravening a positive statute is invalid. *Deadwyler v. Karow*, 131 Ga. 227 (1908).

⁵⁰ *Walls v. Bailey*, 49 N. Y. 476 (1872).

⁵¹ *Walls v. Bailey*, 49 N. Y. 477 (1872).

While there has been some controversy as to whether a local custom may be shown by a single witness, the rule seems to have been settled by modern decisions that the testimony of one witness may be sufficient.⁵² And it may be proved even by the party's own testimony.⁵³ To establish a custom it is not necessary that all the witnesses on both sides must agree about it. If they differ as to its existence in the same place or in all places it raises a question for the jury.⁵⁴

§ 225. Rules of Real Estate Boards.

While a real estate board may undoubtedly make rules and regulations governing and binding upon its members, they are not binding upon, nor can they be enforced against non-members; much less can they be held to constitute a rule of evidence binding or controlling the courts in the trial of causes. The rules of a real estate board do not establish a custom or usage, for to do so would require that they be acted upon with uniformity, and be so generally known and established as to raise a fair presumption that they were known to the contracting parties so that they may be assumed to have contracted with relation to them, and with knowledge of them. It would also be necessary to show that the rate established by such a rule was reasonable and customary for such services.⁵⁵

Courts will not take judicial cognizance of the rules of a board of brokers, unless they are rules or usages of trade and commerce, which would be recognized without their adoption by any particular board or association.

⁵² *Jones v. Herrick*, 118 N. W. 444 (Iowa 1908), (citing *Southwest Va. M. & L. Co. v. Chase*, 95 Va. 50; 27 S. E. 826; *Robinson v. U. S.* 13 Wall. 363; 20 L. Ed. 653; *Vall v. Rice*, 5 N. Y. 155; *Partridge v. Forsyth*, 29 Ala. 200; 3 *Wigmore on Ev.*, § 2053).

⁵³ *Gleason v. Met. St. R. Co.*, 99 App. Div. 211 (1904). See also *Chambers v. Peters*, 30 Misc. 756 (N. Y. 1900).

⁵⁴ *Dickinson v. City of Poughkeepsie*, 75 N. Y. 77 (1878). See also § 226 *infra*.

⁵⁵ *Springer v. Stiltz*, 133 Ill. App. 551, 552 (1907), (citing *Calland v. Trapet*, 70 Ill. App. 228; *Blissell v. Ryan*, 23 Ill. 566).

The party who relies upon such rules must plead them. "When a contract is entered into with reference to rules of that character, they become, in effect, special terms of the contract, and they must be averred by the party who claims that he has performed the contract on his part in accordance with such rules, or that the other party has failed to comply therewith."⁵⁶

In the absence of a special contract, a real estate broker who sells a leasehold is not entitled to the same commissions as if he had sold the fee, and a rule of a real estate exchange allowing commissions on the full value of the fee under such circumstances would not control the situation unless it were proven that the rule was of such public notoriety that the principal must be presumed to have had knowledge of it, and therefore to have dealt expecting to be bound by it.⁵⁷

§ 226. Compensation in the Absence of Agreement or Usage.

Where there is no agreement as to the amount of commission and no custom on the subject, the broker is entitled to what his services are reasonably worth. "The amount, in the absence of a contract or usage fixing it, must as in other cases, be what the services were fairly worth."⁵⁸ "In such cases the common course is to prove what price or sum is usually or customarily paid for services of the kind shown to have been rendered; and it is no objection to a recovery that the witnesses disagree in their evidence as to the price which is usually paid."⁵⁹

Where the plaintiff claims commissions pursuant to custom, it seems that evidence on his behalf of the rea-

⁵⁶ Goldsmith v. Sawyer, 46 Cal. 209 (1873).

⁵⁷ Groseup v. Downey, 105 Md. 273 (1907).

⁵⁸ Briggs v. Boyd, 56 N. Y. 289, 295 (1874).

⁵⁹ Walker Mfg. Co. v. Knox, 136 Fed. 339 (1905). See also § 224 *supra*.

sonable value of his services is nevertheless likewise admissible.⁶⁰ But where he sues under a contract fixing the compensation, evidence of the value of the services is inadmissible.⁶¹

In an action brought by a broker to recover commissions, he is a competent witness as to the value of his services as broker.⁶²

⁶⁰ *Rubino v. Scott*, 118 N. Y. 662 (1889). See also *Fleming v. Wells*, 101 Pac. 66 (Colo. 1909), referred to in § 222 *supra*.

⁶¹ *Fordtran v. Stowers*, 113 S. W. 631 (Tex. 1908). See also *Reams v. Wilson*, 147 N. C. 304 (1908), which cites other authorities, as indicated in § 218 *supra*.

⁶² *Chambers v. Peters*, 30 Misc. 756 (N. Y. 1900).

CHAPTER XXIII.

WHEN COMMISSIONS ARE DUE.

§ 227. General Statement.

Commissions are due when the broker has been the procuring cause of the sale. (§ 228.)

The courts are quite unanimous that the broker's commissions are not, unless expressly so agreed, dependent upon the actual closing of title or upon payment for the property sold. (§§ 228, 229.)

After a broker's commissions are earned, his subsequent agreement to wait for payment until title is closed or until the happening of some other event, is not binding, unless supported by some real consideration. (§ 230.) But such an agreement is valid if made before the commission is earned (§ 231), and such contingent agreements are subject to the terms thereof. (§ 232.)

Agreements providing that commissions are to be paid at the "closing of title" are construed to mean on the day when the title was agreed to be closed, and such commissions are not defeated by the principal's inability to close the sale due to his defective title. (§§ 233, 234.)

When land is sold on the instalment plan, the broker's commissions, unless otherwise agreed, are earned and due when the sale is made. (§ 235.)

§ 228. Rule as to When Commissions Are Due.

Conceding that all the essentials exist which entitle the broker to his commissions,¹ there remains to be de-

¹ See Ch. IX *supra*.

terminated the question, When are the commissions due? While it is impossible to formulate a rule for all occasions, the general statement may be made that commissions are due when the broker has been the procuring cause of the sale.

As has been seen,² the courts are not harmonious as to just when the broker may claim to be the procuring cause of a sale. In some jurisdictions the broker is not regarded to have been the procuring cause until he procures an enforceable contract of sale. Where that rule prevails, the commissions are not due until such contract has been procured. As the broker's obligation under the usual employment does not require him to see that the contract is carried out, he may under the rule just stated, claim his commission upon the execution of the contract.³

Other jurisdictions hold to a somewhat different view as to when the broker is the procuring cause of the sale. This view, which is by far the more generally recognized, is that the broker is the procuring cause of the sale and his commissions therefore become due and payable upon the production of a purchaser, ready, willing and able to purchase upon his employer's terms. As a greater variety of questions usually present themselves under this rule than under the one first stated, the several sections immediately following are devoted to a presentation of authorities of more or less consequence dealing only with the latter, and, as has been said, more generally recognized rule.

Although there are authorities, notable mostly on account of their scarcity, which hold, in effect, that the broker is not entitled to his commission until the actual consummation of a sale by the delivery of the deed and the payment of the purchase price,⁴ yet under either of

² §§ 117-119 *supra*.

³ See § 229 *infra*.

⁴ See Ch. XI *supra*.

the rules above stated, the commissions are, of course, due when the broker produces a person who enters into an enforceable contract with the vendor.⁵ Where a contract of sale is executed between the employer and the purchaser, the right of the broker to his commissions does not depend upon the performance of the contract by the purchaser.⁶

If from a defect in the title of the vendor, or from a refusal to consummate the contract upon the part of the purchaser or for any reason in no way attributable to the broker, the sale falls through, nevertheless the broker is entitled to his commissions for the simple reason that he has performed his contract.⁷

§ 229. Requirements of an Earned Commission.⁸

Excluding now any present consideration of the conflict of opinion referred to in the preceding section, and confining the discussion to what has been said to be the prevailing rule, it may be stated that the duty assumed by the broker is to bring the minds of the buyer and seller to an agreement for a sale on the price and terms under which it is to be made, and until that is done his right to commissions does not accrue.⁹ But, in order to entitle the broker to commission, under this rule, it is not necessary that a contract of sale should actually have been executed, or that some note or memorandum of the sale should be made in writing. He is entitled to his commission upon the production of a purchaser ready, willing and able to purchase the property upon the terms fixed by the seller.¹⁰ And without a special agreement

⁵ *Brady v. Foster*, 72 App. Div. 416 (N. Y. 1902).

⁶ *Pinkerton v. Hudson*, 113 S. W. 35 (Ark. 1908).

⁷ *Brady v. Foster*, *supra*. See Ch. XVI *supra*, "Failure of Principal to Complete," and Ch. XVII *supra*, "Failure of Customer to Complete."

⁸ See § 228 *supra*, as to scope of this section.

⁹ *Rae Co. v. Kane*, 132 App. Div. 935 (N. Y. 1909).

¹⁰ *Mooney v. Elder*, 56 N. Y. 238 (1874); *Flower v. Davidson*, 44 Minn. 46 (1890); *Hinds v. Henry*, 36 N. J. L. 332 (1873); *Monroe v. Snow*, 131 Ill. 136 (1891), (citing *McGavock v. Woodlief*, 28 How. 221; *Doty v. Miller*, 43 Barb. (N. Y.) 529; *Bailey v. Chapman*, 41 Mo. 537).

or understanding¹¹ that the commissions are to be paid out of the purchase money received by the seller, the broker is, under this, the prevailing rule, entitled to his commissions when he produces the purchaser,¹² ready, willing and able to purchase upon the principal's terms.

"It is not the duty or obligation of an ordinary broker to see to it that the seller has a good title, or that he enters into an enforceable contract; his duty is done when he has brought a purchaser who is ready, willing and able to purchase upon the conditions named by the seller, and when this is done his commissions are earned."¹³

Under this rule, which, as stated, is the prevailing rule, when the broker produces a purchaser, able and willing to purchase on the owner's terms, but the sale falls through on account of serious encroachments which the owner failed to disclose either to the broker or to the purchaser until the parties meet to sign the contract, the broker is entitled to recover his commissions.¹⁴

§ 230. Unsupported Agreements to Wait for Commission.

While the broker may by special agreement, so contract as to make his compensation depend upon the actual signing of a contract, or upon the actual passing of title, or upon other contingencies,¹⁵ yet a broker who has fully earned his commission is generally not bound by any subsequent agreement that no commission is to be paid unless the deed passes, for such an agreement is without consideration and cannot affect the obligation of the vendor to the broker.¹⁶ And the agreement is not more binding because it recites a consideration of "one

¹¹ See §§ 230-233 *infra*.

¹² *Mooney v. Elder*, 56 N. Y. 238, 242 (1874).

¹³ *King v. Knowles*, 122 App. Div. 414 (N. Y. 1907).

¹⁴ *Scott v. Neuberger*, 58 Misc. 22 (N. Y. 1908).

¹⁵ *Hinds v. Henry*, 36 N. J. L. 332 (1873).

¹⁶ *Moskowitz v. Hornberger*, 15 Misc. 645 (N. Y. 1896).

dollar and other good and valuable considerations," when in fact none passed.¹⁷

As has already been said,¹⁸ the broker's commissions are by the weight of authority earned and due when the minds of the parties are through him brought to an understanding, and an agreement to wait for commissions until the title is closed is unsupported by any consideration. The fact that the seller refuses to make the contract unless the broker agrees to wait for his commission until the title is closed, has been said not to furnish a sufficient consideration.¹⁹

But in another case,²⁰ where the proposed vendor refused to execute the contract unless the broker consented to the incorporation therein of the following provision: "The vendor agrees that Ole E. Larson is the broker who has brought about this sale, and agrees to pay said broker his commission therefor, namely, 1 per cent. when balance of cash amount to be paid is made and deed actually delivered," the court held that before the broker could recover he must show either that the contract was carried out as indicated, or that non-performance was the fault of the defendant.²¹

Where the broker for securing a tenant acquiesced in the remark of the owner that no commissions were to be paid unless his customer took a lease and paid over the money, he is not bound to forego his commission if the customer never pays the money or executes a lease. The broker's acquiescence is not a binding contract because there is no consideration for it.²² In this case,²³ however, the court intimated that there was no pretense that the owner stated to the broker that he would not accept the customer, or execute the agreement, unless the broker

¹⁷ *Rohkohl v. Sussman*, 61 Misc. 249 (N. Y. 1909).

¹⁸ §§ 228, 229 *supra*.

¹⁹ *Hough v. Baldwin*, 50 Misc. 546 (N. Y. 1906).

²⁰ *Larson v. Burroughs*, 131 App. Div. 877 (N. Y. 1909).

²¹ *Citing Seymour v. St. Luke's Hospital*, 28 App. Div. 119 (N. Y. 1898).

²² *Benedict v. Pincus*, 134 App. Div. 555 (N. Y. 1909).

²³ *Id.*

would make the payment of his commissions conditional upon payment by the purchaser.

§ 231. Valid Agreements Deferring Payment of Commissions.

By special agreement, however, the broker's commission may be made to depend upon the actual signing of a contract or passing of title, or other contingency. Agreements by which the broker is to wait for his commission, in order to be binding upon him, must be made before the broker actually has earned his commission, or else must be founded upon some consideration.

Where the principal states that no commissions are to be paid unless title actually passes, or imposes any other condition and does this at the time he engages the broker, the agreement is binding, since it is a part of the contract of employment, and if the broker accepts the employment under such conditions, he must abide thereby.

While the statement in a contract of sale that a certain person is the broker who brought about the sale, may be evidence upon which to hold the seller or the buyer, as the case may be, for commissions, yet such a clause is of no force as to the broker, unless he is a party to the contract. Hence, where such a clause provides that commissions are only to be paid on the transfer of title, it does not bind the broker where he is not a party to the agreement.²⁴

§ 232. Contingent Commission Agreements.

If the broker has made a valid agreement that his commission shall depend upon some contingency,²⁵ he

²⁴ *Willner v. Seale*, 127 App. Div. 180 (N. Y. 1908).

²⁵ See § 231 *supra*.

must show that the contingency has happened, or that it was defeated through some fault of the obligor, before he can recover.²⁶

Where the agreement with the broker provides that "commission or brokerage will be paid only to the one who actually makes and finally completes the sale and has the contract signed," it must be shown that a contract was signed, before commission can be recovered.²⁷

Where the agreement provides that the commission is to be paid "when a contract for the sale is signed," the securing of a parol offer, which is accepted by the principal, where no contract of sale is signed, and the person making the offer fails to complete the purchase, does not entitle the broker to commission.²⁸

Where commissions were not to be paid until and unless title passed, and the purchaser failed to complete his purchase, no right to commissions accrued.²⁹

And where it was agreed between the vendor and the broker that the commission should not be due and payable until title passed, and title did not pass on account of defects therein, the broker is not entitled to commission.³⁰

That the broker was to receive his compensation out of the proceeds of sale does not make his right to compensation necessarily dependent upon the completion of the sale. If the broker performs his part of the contract and the trade is defeated by the inability of the principal to make a good title, then the broker is entitled to compensation for his services, though it cannot be paid, as agreed, out of the purchase money.³¹

Where the broker is to receive as commission all he

²⁶ *Hinds v. Henry*, 36 N. J. L. 333 (1873).

²⁷ *Reichard v. Wallach*, 91 N. Y. Suppl. 347 (1904). See also *Burch v. Hester*, 109 S. W. 399 (Tex. 1908).

²⁸ *Schlansky v. Hillman*, 111 N. Y. Suppl. 696 (1908). See also *McDermott v. Mahoney*, 115 N. W. 32 (Iowa 1908).

²⁹ *Fittichauer v. Van Wyck*, 92 N. Y. Suppl. 241 (1905).

³⁰ *Cooper v. O'Neill*, 53 Misc. 319 (N. Y. 1907). But see § 233 *infra*.

³¹ *Cheatham v. Yarbrough*, 90 Tenn. 77 (1891). See also *Berg v. San Antonio Co.*, 17 Tex. Civ. App. 291 (1897).

can get above a fixed price, he is entitled to no compensation until the principal receives the price fixed upon, unless his failure to receive it is his own fault. Hence the agent has no right to retain advance money forfeited by a proposed purchaser, such money belonging to the principal.³² And at least where the rule prevails that the broker must bring about a consummated sale to earn his commission,³³ the broker cannot retain from the vendor the forfeit money paid by a purchaser who fails to complete.³⁴

§ 233. Construction of Agreements to Wait Until Title Is Closed.

Even where commissions are to be paid "at the closing of title," it has been held to mean, not when the title is actually closed, but the day when the title was agreed to be closed.³⁵

Where a so-called "binder" for the sale of property provided for a time when the formal contract was to be executed, and also contained the following clause, "commissions to be paid to * * * on closing of title," the court held that the provision merely fixed the time when the brokerage should be payable if the contract was performed, and that the actual closing of the title was not a condition precedent to recovery of the brokerage.³⁶ The court further said: "The case of *Fittichauer v. Van Wyck*, 92 N. Y. Suppl. 241 (1905), does not apply, because there the broker's commissions were not to be paid until and unless title passed. *Haase v. Schneider*, 112 App. Div. (N. Y.) 336 (1906), *Peace v. Ross*, 123 App. Div. (N. Y.) 611 (1908) and *Shapiro v. Nadler*, 51 Misc.

³² *Burnett v. Potts*, 236 Ill. 499 (1908). See also § 215 *supra*.

³³ See §§ 117-119 *supra*.

³⁴ *Chambers v. Herring*, 88 S. W. 371 (Tex. 1905).

³⁵ *Morgan v. Calvert*, 126 App. Div. 327 (N. Y. 1908). And see *Pinkerton v. Hudson*, 113 S. W. 35 (Ark. 1908).

³⁶ *Meltzer v. Straus*, 61 Misc. 253 (N. Y. 1909), (citing *Morgan v. Calvert*, 126 App. Div. 327 (N. Y. 1908)).

(N. Y.) 13 (1906) are inapplicable," to such a case, "for the reason that, in those cases, the parties *had not agreed* upon the terms of the contract, while, in the present case, there was sufficient evidence to warrant the jury in finding that the parties fully reached an agreement as to terms."

Where the agreement is that the broker shall have as commission all he secures above a fixed price, part to be paid on execution of contract and balance "at the closing of the title," the court thought that "the fair reading of the contract does not make the actual closing of the title a condition precedent to the right of the plaintiff (the broker) to his commission. * * * The mere fact that by reason of the defendant's defective title he is unable to complete his contract at that time does not operate to postpone the plaintiff's right to payment."³⁷

In another case,³⁸ it was held that where the broker agreed that no commission should be paid until title passed, assuming such an agreement to be good,³⁹ one party cannot arbitrarily refuse to complete the sale and be relieved of liability for commission. The fair intentment of such an agreement is that the broker's commission fails only in case title is not passed on account of some circumstance beyond the party's control. And where the commission was to be paid out of the final payments made by the purchaser, the fact that the final payments were not made, because the purchaser objected to the validity of the title, and the vendor thereupon returned the payments on account, does not deprive the broker of his right to recover.⁴⁰

Where the seller deposits a sum with the purchaser's attorney to be delivered to the broker upon the seller's order when title passes, and the purchaser does not com-

³⁷ *Morgan v. Calvert*, 126 App. Div. 327 (N. Y. 1908).

³⁸ *Greenwald v. Rosen*, 61 Misc. 260 (N. Y. 1909).

³⁹ See §§ 230 *supra*, 234 *infra*.

⁴⁰ *Bankers Loan Co. v. Spindle*, 108 Va. 426 (1908).

plete his purchase, the seller has a right to the return of the money irrespective of whether the broker earned his commission as the deposit was subject to the seller's order. In such case if the broker has earned his commission and the seller refuses to give the order, the matter is one between the broker and the seller.⁴¹

§ 234. Deferred Commissions and Vendor's Warranty as to Title.

In a Texas case⁴² it is said: "In the case of *Gauthier v. West*, 47 N. W. Rep. 656, it is stated that if the broker agrees to wait for his commission until the sale is fully completed, there is an implied contract that the defendant had the ability and would confer upon the purchaser a perfect title to the property. We think this is sound. And we are unable to see any difference between cases where the owner agrees to pay the agent generally, and where there is a stipulation that he is to receive his pay when the sale is completed, or out of the proceeds when they are received. In the latter case it is true, the agent would have to await the completion of the sale, or the receipt of the proceeds after the sale. So far his compensation would be conditional. In cases where he is to be paid upon the completion of the sale, the authorities are that the broker is, nevertheless, entitled to compensation, if the sale was not completed, because of the owner's inability to give a good title. This being the case, how can it be said that a stipulation that he was to await the payment of the purchase money, or be paid out of the purchase money when received, relieves the owner from the implied warranty that he has a good title, when this sale is defeated and thereby the fund out of which the agent was to be paid is defeated, for such reasons? If the agent

⁴¹ *Bogart v. Reich*, 128 App. Div. 854 (N. Y. 1908).

⁴² *Berg v. Street Railway Co.*, 17 Tex. Civ. App. 301, 302 (1897).

can recover in the one case he should in the other. As a matter of course, an agreement might be made whereby the broker will not be entitled to compensation if the sale is defeated by reason of the title, or for any other reason. There is nothing in the contract that can be so construed. It is plain and unambiguous. It was agreed that he should have for his services in selling appellant's bonds, the excess over a fixed sum net, to be paid in cash as the same should be received from the purchasers. In other words, if he sold the bonds for a surplus over the fixed sum, he was to be paid this surplus, but as to deferred payments, having to await their payment, to this extent only his pay was conditional. There was no condition that if the sale failed for any reason, he was to receive no commissions. If such had been his agreement, it may be that it would have done away with all implied warranty, as was held in *Flower v. Davidson*, 46 N. W. Rep. 308. It may be proper to state in this connection that in a later case in Minnesota, *Cromer v. Miller*, 57 N. W. Rep. 318, the doctrine announced in *Flower v. Davidson* was, it seems, applied to a case where the agent's commission depended upon the payment of the purchase money, and the Court held in that case, citing *Flower v. Davidson*, in effect, that such a stipulation did away with the implied warranty concerning the title. There is no reference to *Gauthier v. West*, which seemed to hold the contrary, a case decided by the same court. We are of opinion that it requires more than the agreement shows in the present case to be construed to exclude such warranty."

§ 235. Commissions on Instalment Sales.

Lots in the suburbs are frequently sold on the instalment plan. Urban property is sometimes also so sold. Where land companies are engaged in selling suburban

property on the instalment plan, they usually have an agreement, or at least an understanding with their selling agents as to how the commissions shall be paid.⁴³

In the absence of any agreement, the broker need not wait for his commissions until collection of deferred purchase money payments.⁴⁴ He is not a guarantor of deferred payments or covenants, and is entitled to his commission when he has brought about a sale on his principal's terms or upon terms satisfactory to the principal. The broker does not therefore have to wait until all deferred payments are paid and all covenants on the part of the purchaser are complied with.⁴⁵

But where the broker brings a purchaser who agrees to pay for the land in instalments, and the vendor agrees with the broker that the latter is to receive his commissions as each instalment of the purchase price is paid, the broker is entitled to commissions only on the amounts of the purchase price actually paid.⁴⁶

On the other hand, where commissions were to be paid out of the purchase money as it was paid to the vendor in instalments and some of the payments were made, but before all were made the purchaser became insolvent and the vendor foreclosed and bought in the land at a price equal to the amount still due him, it was held that the broker was entitled to recover the balance of his commission.⁴⁷ The same would be true had someone else bid in the property at the foreclosure sale, and the original vendor thus received the balance of the purchase price. So long as the original vendor received the balance of the purchase price, in any of the ways contemplated by the contract of sale, the broker could recover the balance of commissions remaining unpaid.⁴⁸

⁴³ See Form 39 *infra*, Part VII. for a comprehensive agreement of this nature.

⁴⁴ *Hancock v. Dodge*, 85 Miss. 228 (1904).

⁴⁵ *Morgan v. Keller*, 194 Mo. 680 (1905).

⁴⁶ *Murray v. Rickard*, 103 Va. 132 (1904). See also *Moore v. Irvin*, 20 L. E. A. (N. S.) 1172 (Ark. 1909).

⁴⁷ *Crane v. Eddy*, 191 Ill. 645 (1901).

⁴⁸ *Id.*

PART III.—PRINCIPAL AND AGENT.

CHAPTER XXIV.

PRINCIPAL'S RELATIONS TO AGENT.

§ 236. General Statement.

An owner may employ several brokers for the sale of the same property and is liable for commissions only to the broker who effects the sale. (§ 237.) Although an owner employs several brokers, he may negotiate and sell the property himself without liability for commissions. (§ 238.)

If the owner gives an exclusive agency, he subjects himself to liability for breach of contract if he engages or avails himself of the aid of another broker for the same purpose, but the owner himself may negotiate personally unless he has also precluded himself from so doing. (§ 239.)

If while the broker is negotiating, the owner intervenes and concludes the sale, the broker is still entitled to his commissions. (§ 240.) But if the broker's efforts fail or his authority is in good faith terminated, the owner is not precluded from negotiating thereafter with purchasers who were introduced by the broker. (§§ 241, 242.)

§ 237. Principal May Employ Several Brokers.

“An owner may employ several brokers for the sale of the same property, and is of course only liable for com-

missions to the one who effects the sale.”¹ “A person may place his property with as many brokers to sell as he sees fit, but it is only the one who produces a buyer, ready and able to purchase on the employer’s terms, that becomes entitled to commissions.”²

§ 238. Negotiations by Principal.

The employment of one broker does not disable the owner from employing another, or from negotiating a sale in person, since the right of the principal to do in person or by another that which he has empowered his agent to do, is an implied condition of every agency.³ The owner does not agree that he will not during the time sell the property himself or through the agency of another broker.⁴ Where the agency is not exclusive⁵ the mere fact that property is left in a broker’s hands to sell does not preclude the owner from selling it aside from the broker.⁶ The owner may always in good faith sell independent of the broker unless he has agreed not to do so.⁷ And if he sells the property himself, he is not liable to any one for commissions.⁸

§ 239. Exclusive Agency.

If the owner employs a broker with the understanding that the latter’s agency shall be exclusive, the owner subjects himself to liability for breach of contract if, notwithstanding, he engages or avails himself of the aid

¹ *Sussdorff v. Schmidt*, 55 N. Y. 321 (1873); *Hoadley v. Sav. Bk.*, 71 Conn. 599 (1899); *Cook v. Forst*, 116 Ala. 396 (1896). See also Chap. IX *supra*.

² *Freedman v. Havenmeyer*, 37 App. Div. 518 (N. Y. 1899).

³ *Levy v. Rothe*, 17 Misc. 403 (N. Y. 1896), (citing *Chilton v. Butler*, 1 E. D. Smith (N. Y.) 150; *Goldsmith v. Cook*, 39 N. Y. St. Rep. 57; *Dole v. Sherwood*, 5 Law. Rep. Ann. 720). See also *Rothenburger v. Schoniger*, 99 S. W. 1150 (Ky. 1907).

⁴ *Briggs v. Boyd*, 56 N. Y. 294 (1874); *Hoadley v. Savings Bk.*, 71 Conn. 599 (1899); *Kimball v. Hayes*, 199 Mass. 520 (1908).

⁵ See § 239 *infra*.

⁶ *Cole v. Kosch*, 116 App. Div. 718 (N. Y. 1907); *Armstrong v. Wann*, 29 Minn. 126 (1882); *Dolan v. Scanlan*, 57 Cal. 265 (1881).

⁷ *Burch v. Hester*, 109 S. W. 399 (Tex. 1908); *Cook v. Forst*, 116 Ala. 396 (1896); *Humphries v. Smith*, 5 Ga. App. 343 (1908).

⁸ *Sussdorff v. Schmidt*, 55 N. Y. 321 (1873); *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 384 (1880); *Hoadley v. Savings Bk.*, 71 Conn. 599 (1899).

of another broker for the same purpose.⁹ But the owner himself may negotiate personally, unless his agreement with his broker precludes him also from so doing.¹⁰ But while a broker may have the exclusive agency to sell, there is nothing in that fact, unless the agreement so provide, which entitles him to commissions, unless he is the procuring cause of the sale.¹¹

§ 240. Intervention of Principal.

If the purchaser is found by the broker's efforts and through his instrumentality, he is entitled to compensation, although the owner negotiates the sale himself.¹²

Also, if the owner, while the broker is treating for the sale of the property, interferes and makes a bargain himself with the same person for the sale, upon the terms prescribed for the broker, or upon any other terms, he is liable for the commissions.¹³ Thus where a broker employed to sell at a specified price, procures a proposed purchaser and opens negotiations with him, the fact that the employer, without terminating the agency or the negotiations so commenced, takes the matter into his own hands and concludes the sale at a lower price does not deprive the broker of his right to commissions.¹⁴

§ 241. Intervention of Principal after Broker's Failure or Termination of Authority.

Where a broker opens negotiations, but fails to bring

⁹ *Levy v. Rothe*, 17 Misc. 403 (N. Y. 1896). For forms for exclusive agency see Forms 36, 37 *infra*, Ch. XL.

¹⁰ *Levy v. Rothe*, *supra*; *Dole v. Sherwood*, 5 L. R. A. 720 (Minn. 1889).

¹¹ *Davis v. Van Tassel*, 107 N. Y. Suppl. 910 (1907); *Wiggins v. Wilson*, 45 So. 1014 (Fla. 1908), (citing *Waterman v. Boltinghouse*, 82 Cal. 659; 23 Pac. 195; *Cathcart v. Bacon*, 47 Minn. 34; 49 N. W. 331; *Blodgett v. Sioux C. & St. P. Ry. Co.*, 63 Iowa 606; 19 N. W. 799; *McGavock v. Woodlief*, 20 How. (U. S.) 221; 15 L. Ed. 884; *Wylle v. Marine Nat. Bk.*, 61 N. Y. 415; *Babeock v. Merritt*, 1 Colo. App. 84; 27 Pac. 882; *Stephens v. Scott*, 43 Kans. 285; 23 Pac. 555; *Henderson v. Vincent*, 84 Ala. 99; 4 So. 180; *Illingsworth v. Slosson*, 19 Ill. App. 612; *Cullen v. Bell*, 43 Minn. 226; 45 N. W. 428). See also §§ 99, 100 *supra*.

¹² *Sussdorff v. Schmidt*, 55 N. Y. 322 (1873). See also § 100 *supra*.

¹³ *Briggs v. Boyd*, 56 N. Y. 294 (1874); *Hovey v. Aaron*, 133 Mo. App. 582 (1908); *Hoadley v. Savings Bk.*, 71 Conn. 599 (1899). See also §§ 129, 130 *supra*.

¹⁴ *Hobbs v. Edgar*, 23 Misc. 618 (N. Y. 1898); *McGovern v. Bennett*, 146 Mich. 558 (1906); *Glade v. Eastern Ill. Min. Co.*, 107 S. W. 1005 (Mo. 1908).

the customer to the specified terms and abandons the negotiations, the employer may subsequently sell to the same person at the price fixed, without liability for commission.¹⁵ Also, where there was no employment, and the owner sold the property to a person who had made an offer through the broker almost two years before, it was held that there was no ratification of an employment of the broker alleged to have been made by the owner's agent, especially where the owner himself knew nothing about any claim of the broker.¹⁶

In *Miller v. Vining*, 112 App. Div. 304 (N. Y. 1906), where the negotiations with the prospective purchaser were broken off, and the broker undertook to sell him other properties of different people, and a month afterward, without the intervention of the broker, the owner and the purchaser came together on different terms, resulting in a sale, the court, in holding that the broker was not entitled to commissions, said: "It is elementary that to be entitled to commissions the broker must be the procuring cause of the sale, and if his efforts fail his employer is not precluded from thereafter negotiating with the purchaser introduced by him, even on the same terms, without being obliged to pay commissions."

§ 242. Rule when Broker's Efforts Fail.

In *Schano v. Storch*, 56 Misc. 484 (N. Y. 1907), the Appellate Term stated the rule thus: "Where a broker's efforts fail, his employer is not precluded from thereafter negotiating with the purchaser found by the broker, even on the same terms, and the mere fact that the broker's efforts may have led to subsequent negotiations, which, under more favorable circumstances, re-

¹⁵ *Smith v. Kimball*, 193 Mass. 585 (1907); *West End Dry G. S. v. Maun*, 133 Ill. App. 550 (1907); *Fairchild v. Cunningham*, 84 Minn. 524 (1901); *Markus v. Kenneally*, 43 N. Y. Suppl. 1056 (1897).

¹⁶ *Cohn v. Lee*, 132 App. Div. 697 (N. Y. 1909).

sulted in a sale, does not alone entitle the broker to a commission." ¹⁷

But it is evident that this only applies where the broker's efforts have ended in failure. After the broker's failure to bring about a sale, or after his authority is fairly and in good faith terminated, others may to some extent avail themselves of the fruits of his labors. In such case the principal may sell to the first party who offers the price asked and it matters not the sale is to the very party with whom the broker had been negotiating.¹⁸ But "if the efforts of the broker are rendered a failure by the fault of the employer; if capriciously he changes his mind after the purchaser, ready and willing, and consenting to the prescribed terms, is produced; or if the latter declines to complete the contract because of some defect of title in the ownership of the seller, some unremoved incumbrance, some defect which is the fault of the latter, then the broker does not lose his commissions." ¹⁹

¹⁷ See also *West End Dry G. S. v. Maun*, 133 Ill. App. 550 (1907).

¹⁸ *Hoadley v. Savings Bk.*, 71 Conn. 599 (1899); *Emery v. Atlanta Exch.*, 88 Ga. 329 (1891), (citing *Livezy v. Miller*, 61 Md. 336; *Lipe v. Ludewick*, 14 Ill. App. 372; and others).

¹⁹ *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 383, 384 (1880).

CHAPTER XXV.

AGENT'S RELATIONS TO PRINCIPAL.

§ 243. General Statement.

An agent is bound to exercise good faith, reasonable diligence and ordinary skill (§§ 244-246), and he must not exceed his authority. (§ 247.)

It is the agent's duty to disclose to his principal any information he may have relevant to the agency, and the presumption is that he does make such disclosure, except where he has some private purpose, the accomplishment of which would be imperiled thereby. (§ 248.)

The agent may, as a necessary incident of powers expressly conferred, make and endorse negotiable paper in the transaction of his principal's business. (§ 249.)

In some jurisdictions an action against an agent for conversion of his principal's money will not lie, and the only remedy is an action on contract, but in New York an action in tort will lie to recover money which the agent refuses to deliver to his principal. (§ 250.)

§ 244. Agent's Responsibility to Principal.

"An agent is bound not only to good faith but to reasonable diligence, and to such skill as is ordinarily possessed by persons of common capacity engaged in the same business. Whether or not he has exercised such skill and diligence is usually a question of fact; but its omission is equally a breach of his obligation and injurious to his principal, whether it be the result of inattention or incapacity, or of an intent to defraud."¹

¹ *Heinemann v. Heard*, 50 N. Y. 35 (1872); *Clark & Skyles on Agency*, §§ 392 *et seq.*

§ 245. Agent Must Act in Interest of Principal.

“ It is a well-settled principle of morals as well as of law, that the agent must faithfully serve his principal. However unquestioned may be the honesty of the agent, or his impartiality between his own interests and those of his principal, he is bound to the exercise of all his skill, ability and industry in favor of his principal. As an agent to sell, it is his duty to get the highest fair price; and this duty is wholly incompatible with his wish to buy. In every trust this principle prevails. No agent or trustee can deal with the subject matter of his trust, except for the benefit of his principal. * * * And the rule in equity is, that any act by an agent in respect to the subject matter of the agency, injurious to the principal, may be avoided by the principal, and where an agent to sell becomes the purchaser, the court will presume that the transaction was injurious, and will not permit the agent to contradict the presumption.² The policy of this rule is obvious. The confidence reposed in the agent must not be abused. His position of trust must not be employed to his own advantage, or to the injury of his principal. In short, while in the employment of his principal, his principal's interest must be his interest, and he may have no interest which, conflicting with those of his principal, can work injury to the latter.”³

§ 246. Agent's Duty of Faithful Service.

“ It is the unquestionable duty of an agent to act in matters touching the agency with a sole regard to the interests of his principal. The agent in accepting the employment undertakes to manage the interests confided to him, and discharge the trust reposed in him to the

² Citing *Coles v. Theothick*, 9 Ves. 234, 247.

³ *McDonald v. Lord*, 26 How. Pr. 407 (N. Y. 1864); *Clark & Skyles on Agency*, §§ 404 *et seq.* See also §§ 59-71 *supra*.

best of his ability for the benefit of his principal. The compensation to which he is entitled is the consideration for the engagement into which he enters. The reward is the inducement to the service, and faithful service is generally the condition upon which the reward becomes due. An agent for sale cannot sacrifice the property of the principal for the sake of his commissions, but the desire of earning them is generally a motive to diligence, and an incentive to exertion. When the duty and interest of the agent coincide, and he does the act which his duty prompts, but the impelling motive is the interest which he is to derive from it, and not the duty, the act must stand justified although the motive may be criticised. There is in the case supposed, no conflict between his duty and his interest. The act corresponds with the duty, but the motive which prompted it is a low and inferior one. This cannot, however, affect the validity of the act as between the principal and agent.”⁴

§ 247. Agent Must Not Exceed Authority.

“An agent must also obey instructions and observe the terms of the agency; otherwise he does not perform, in the eye of the law, his full duty towards his principal and is not entitled to receive the compensation for his services promised to him in the contract of agency.”⁵

“A departure by an agent from his instructions does not *ipso facto* constitute fraud. It is competent evidence on the issue of fraud in an action by the principal against him, and, with other circumstances, may satisfactorily establish it. Agents frequently overstep the limits of their authority, and it is quite conceivable that it is often done in the supposed interest of their principal. In such cases they take the risk. If the principal ratifies

⁴ Price v. Keyes, 62 N. Y. 382, 383, 384 (1875).

⁵ Raleigh R. E. & Trust Co. v. Adams, 145 N. C. 185 (1907).

the act, they stand justified. If he disaffirms it and suffers loss from it, the agent is responsible. But proof that an agent has transcended the limits of his authority, would not alone support an action by the principal for a fraudulent misuse of his power."⁶

§ 248. Agent Must Disclose Information.

"An agent owes a duty to his principal to disclose to him any information which he may have which may be relevant to that agency.⁷ The law conclusively presumes that the agent makes such disclosure, unless the agent has some private purpose to accomplish, the accomplishment of which would be imperiled thereby,"⁸ as where the broker is secretly interested in the deal or is engaged in furthering a scheme to defraud his principal.⁹

"The concealment by an agent of facts which are material to his principal's interests, especially after inquiry made, amounts in law to fraud."¹⁰ And so, where in an exchange, one of the parties requests the broker to ascertain the actual rental of the property he is to take, and the broker procures an erroneous statement thereof, which the principal relies upon and contracts to exchange, but rescinds after learning the facts, the broker is not entitled to commissions.¹¹

§ 249. Agent's Power to Make, and Endorse Negotiable Paper.

"It is not always necessary that explicit authority must be given an agent to justify his indorsement of a

⁶ Price v. Keyes, 62 N. Y. 382, 383, 384 (1875).

⁷ See Raleigh R. E. & T. Co. v. Adams, 145 N. C. 165 (1907); Rodman v. Manning, 99 Pac. 657 (Ore. 1909).

⁸ Crooks v. People's Nat. Bank, 72 App. Div. 335 (N. Y. 1902); Clark & Skyles on Agency, § 416. See also §§ 264-266 *infra*.

⁹ See Henry v. Allen, 151 N. Y. 1 (1896); Benedict v. Arnoux, 154 N. Y. 728 (1898); Constant v. Un. of Rochester, 111 N. Y. 611 (1888).

¹⁰ Low v. Woodbury, 107 App. Div. 298 (N. Y. 1905).

¹¹ Marcus v. Bloomingdale, 63 App. Div. 227 (N. Y. 1901).

check or bill drawn to his principal's order. An agent who is employed to procure a note to be discounted may indorse it in the name of his employer, or he may, unless expressly restricted, indorse it in his own name and claim indemnity of his principal.¹² And the power to make and indorse negotiable instruments may be implied as a necessary incident of powers expressly conferred, as where an entire business or an entire transaction is intrusted to the agent and it becomes necessary to make or indorse negotiable paper in order to effectually carry out the agency."¹³

§ 250. Agent's Liability for Conversion of Money.

The claim is often made, and in some jurisdictions sustained, that conversion will only lie for the conversion of certain specific personal property, to which category money does not belong, and that, therefore, an action for its conversion will not lie; and that the only remedy is an action on contract.

In New York it is settled that an action in tort will lie to recover money received by an agent, broker or other person in a fiduciary capacity, which he refuses to deliver to his principal.¹⁴

¹² Citing *Nelson v. Hudson River R. R. Co.*, 48 N. Y. 498.

¹³ *Porges v. U. S. Mortgage & Trust Co.*, 135 App. Div. 487, 488 (N. Y. 1909), (citing *Whitten v. Bank of Fincastle*, 100 Va. 546; *Gould v. Bowen*, 26 Iowa 77; *Gate City Building & Loan Assn. v. Nat. Bank of Commerce*, 126 Mo. 82).

¹⁴ *Jones v. Smith*, 65 Misc. 528 (N. Y. 1910), (citing *Britton v. Ferrin*, 171 N. Y. 235; *Jackson v. Moore*, 94 App. Div. (N. Y.) 504, 508).

CHAPTER XXVI.

LIABILITY OF BROKER AND PRINCIPAL.

§ 251. General Statement.

If a broker commits a fraud in the course of his employment he is liable and so is his principal. (§§ 252-255.)

All persons who act for or in the name of the owner in bringing about the transaction must be deemed his agents where he accepts the fruits of their efforts, and the owner may not, even though innocent, receive the benefits and at the same time disclaim responsibility for the fraud by means of which they arose. (§§ 254-256.)

§ 252. Misrepresentations by Brokers and Agents.

In case of fraud on the part of agent or principal, there is always more or less difficulty in procuring the proof necessary to establish the conditions, or in determining from the facts presented whether or not fraud was practiced. These are, however, matters of evidence. What is, and what is not considered fraud in real estate transactions is discussed later.¹

Where the vendor himself makes representations and the elements of fraud are present, no serious difficulties present themselves with respect to the substantive law of fraud. Where, however, the misrepresentations are not made by the vendor himself, a question may arise. To what extent is he liable for fraud committed not by himself personally but by others in some way connected with

¹ See Chs. XXIX-XXXIII *infra*.

the transaction? Of course, to incur liability a defendant need not make false representations personally. If he authorized and caused them to be made it is enough.² "If the agent commits a fraud in the course of his employment, he is liable, and so is his principal. If he commits a fraud outside the scope of his authority, he would be liable but not his principal."³ In *Ripy v. Cronan*, 115 S. W. 791 (Ky. 1909), it was said that in the absence of any confidential relation between the broker and intending purchaser, or fraud to prevent inquiry or investigation by such purchaser, a real estate broker cannot be held liable for representing to an intending purchaser that the owner would not accept less than the sum named by the broker for the premises, though the owner had in fact agreed with him to sell at a lower figure.

§ 253. When Vendor is Liable for Broker's Representations.

There are cases which hold that, "As a general proposition, a principal is not responsible for the deceit practiced by his agent, unless there is something in the nature of the engagement, the terms of the employment, or the powers conferred, broad enough to include a power on the part of the agent to deal with the property in such manner that the principal, in good morals and equity, ought to be bound by what the agent may have said. There are many cases which hold the principal responsible for the fraud and misrepresentation and acts of the agent when he accepts the fruits of the contract, and refuses to surrender. As the cases put it, he may not be permitted to reap the harvest and refuse to pay for the seed. When those decisions are examined, it will be

² *Brackett v. Griswold*, 112 N. Y. 467 (1889).

³ *Clark on Contracts*, 745; *Rhoda v. Annis*, 75 Me. 17 (1883); *Brauckman v. Leighton*, 60 Mo. App. 41 (1894); *Farris v. Gilder*, 115 S. W. 645 (Tex. 1909). See also Chs. XXVII, XXVIII *infra*.

seen there was an attempt on the part of the vendee to rescind the sale, and, the vendor refusing, he was held liable for the representations. In all of them the responsibility of the principal is put upon this basis. Where, however, there is no attempt on the part of the vendee to rescind, but he affirms the sale, he can bring his action for deceit only against the agent who has been guilty of the misrepresentations, unless he is able to trace some connection between the principal and the agent, and thereby charge the former with responsibility for what the agent may have said or done. An innocent principal, who has simply authorized an agent to sell property, cannot be charged in an action of deceit for the agent's wrongs unless in some manner he be connected with them. This distinction is recognized, and the doctrine commends itself to our judgment."⁴

The courts are not, however, unanimous in thus restricting the liability of the principal as will be seen by an examination of the succeeding sections. On the contrary, it has been said that the current of authority appears to be in favor of discarding all such distinctions and holding the principal liable at law and in equity alike for the frauds of his agent or servant in the course of employment, provided, of course, they were committed within the scope of authority of the agent and in the interest of the principal.⁵

§ 254. Vendor Liable if He Accepts Proceeds.

"All persons who act for or in the name of the owner in bringing about the transaction must be deemed his agents where he accepts the fruits of their efforts, and all the methods employed by them are imputable to him; he may not even, though innocent, receive and recover

⁴ Mayo v. Wahlgreen, 50 Pac. 43 (Colo. 1897), (citing Kennedy v. McKay, 43 N. J. L. 393; Decker v. Fredericks, 47 N. J. L. 469; 1 Atl. 470).

⁵ Alger v. Anderson, 78 Fed. Rep. 729 (1897). See also Clark & Skyles on Agency, pp. 1112-1113; 1 Am. & Eng. Ency. of Law (2nd Ed.), 1178-1179.

upon a security given on the sale and at the same time disclaim responsibility for the fraud by means of which the purchaser was induced to deliver it.”⁶ “It is an established principle of law that where a person acts for another who accepts the fruits of his efforts, the latter must be deemed to have adopted the methods employed, as he may not, even though innocent, receive the benefits and at the same time disclaim responsibility for the fraud by means of which they arose.”⁷ “Where a principal adopts and ratifies the acts of his agent by receiving the fruits of it or otherwise, he assumes responsibility for the instrumentalities which the agent has employed in his behalf to effect the contract.”⁸ Even where the agent’s false representations were never authorized or suspected by the principal,⁹ a reception and retention of the proceeds may make the latter responsible for the fraud.¹⁰

§ 255. Principal Bound by Agent’s Representations.

In *Mayer v. Dean*, 115 N. Y. 560, 561 (1889), it is said: “There is no doubt of the general rule that to a certain extent a principal is bound by the representations of his agent made in effecting a sale of property. Such an agent must be presumed to possess authority to make such representations in regard to its quality and condition as usually accompany such transactions, and his

⁶ *Fairchild v. McMahon*, 139 N. Y. 290 (1893); *Garner v. Mangam*, 93 N. Y. 642 (1883); *Rhoda v. Annis*, 75 Me. 24, 25 (1883); *Forster v. Wilhusen*, 14 Misc. 520 (N. Y. 1895).

⁷ *Taylor v. Commercial Bank*, 174 N. Y. 188 (1903). To the same effect are *Carr v. Nat. Bank & Loan Co.*, 43 App. Div. 10 (N. Y. 1899); *Seeber v. People’s Bldg., etc., Assn.*, 36 App. Div. 316 (N. Y. 1899); *People v. Campbell*, 22 App. Div. 170 (N. Y. 1897); *Reynolds v. Witte*, 13 S. C. 16 (1879). See also *Reitman v. Fiorillo*, 72 Atl. 74 (N. J. 1909), and 3 *Columbia Law Review*, 395.

⁸ *Rumsey v. Briggs*, 139 N. Y. 331 (1893); *Lane v. Black*, 21 W. Va. 626 (1883).

⁹ *Law v. Grant*, 37 Wisc. 557 (1875).

¹⁰ *Coykendall v. Constable*, 99 N. Y. 314 (1885); *Alger v. Anderson*, 78 Fed. 735 (1897), (citing *Franklin v. Ezell*, 1 Sneed 497; *Barnard v. Iron Co.*, 85 Tenn. 139; 2 S. W. 21; *Jewett v. Carter*, 132 Mass. 335; *Cont. Ins. Co. v. Ins. Co. of Penn.*, 2 C. C. A. 535; 51 Fed. 890; 2 Jag. Torts. 267, 271; *Story on Agency*, §§ 134, 452; 1 Am. & Eng. Enc. of Law (2nd Ed.), 1158, 1159; 1 *Rigelow on Fraud*, 225-228; 2 Kent Comm., marg. p. 621 and notes; *Kennedy v. McKay*, 43 N. J. L. 288; *Mason v. Crosby*, 16 Fed. Cas. 1016; *Doggett v. Emerson*, 7 Fed. Cas. 804).

principal cannot receive the fruits of a bargain without adopting the instrumentalities employed by his agent in bringing it to a consummation.¹¹ In an action between vendor and vendee, knowledge possessed by either the principal or the agent is, respectively, imputable to each other, and an agent, whose principal has knowledge of latent defects in property proposed to be sold, cannot honestly represent to its intending purchaser that it is free from such defects. It is well settled in this state that a principal cannot retain the benefits of a contract obtained through the misrepresentations of his agent, even though the principal was ignorant of the representation and really intended no fraud. It was held in *Bennett v. Judson*, 21 N. Y. 238 (1860), that a vendor of land is responsible for material misrepresentations, in respect to its location and quality, made by his agent without express authority, and in the absence of any actual knowledge by either the agent or the principal, whether the representations were true or false. * * * It is consonant with reason and justice that a principal should not be allowed to profit by the fraud of his agent; and if he adopts the contract made in his behalf, although ignorant of the fraud, he should be held liable to make compensation to the party injured by it."¹²

§ 256. Acceptance of Proceeds Test of Liability.

In *Krumm v. Beach*, 96 N. Y. 398 (1884), the contract of sale was made by the agent in his own name, without the knowledge of the principal, and all the fraudulent representations came from the agent and were unknown to the principal until after the conveyance. Held, the receipt and retention by the principal of the fruits and product of a fraud involves a liability on account of it,

¹¹ Citing *Bennett v. Judson*, 21 N. Y. 238 (1860).

¹² Citing *Sandford v. Handy*, 23 Wend. 260; *Griswold v. Haven*, 25 N. Y. 595; *Indianapolis, etc., R. R. Co. v. Tyne*, 63 N. Y. 653.

although the principal is innocent of personal participation in the wrong. The defrauded vendee may rescind the contract and recover back his consideration after an offer to reconvey and a tender of what had been received, or he may stand upon the contract and require of the vendor its complete performance or such damages as would be the equivalent of that complete performance.¹³ In another case where fraudulent representations by agents as to rents were relied upon as giving the vendee the right to rescind the contract, it was held that the vendor must in some way be connected with the fraud before such relief would be given.¹⁴ In this case the agents were not employed by the vendor and their statements as to rentals were not authorized by him nor known to him.

§ 257. Fraud of Agent. Pleading.

Where the false representations are made through an agent and the principal is sued, it is unnecessary to allege any agency in the making of the representations. A simple allegation that they were made by the defendant is appropriate.¹⁵ Although an act is done through an agent, it should be alleged as done by the principal, leaving the method of doing it to the proof.¹⁶

¹³ *Krumm v. Beach*, 96 N. Y. 398 (1884).

¹⁴ *Rothstein v. Isaac*, 124 App. Div. 133 (N. Y. 1908).

¹⁵ *Harlow v. Haines*, 63 Misc. 98 (N. Y. 1909). And see 16 Ency. of Pl. & Pr., 901-904.

¹⁶ *Moffett v. Jaffe*, 132 App. Div. 7 (N. Y. 1909).

CHAPTER XXVII.

LIABILITY OF PRINCIPAL TO THIRD PARTIES.

§ 258. General Statement.

The principal is liable generally to third parties for the torts of his agent in the course of his employment, but not for the willful trespass of his agent, committed without color of right or semblance of authority. (§§ 260-262.)

The principal, whether known or unknown, may be held on a contract made with authority by an agent, though in the agent's name, unless exclusive credit is given to the agent. (§ 263.)

Subject to certain limitations, notice to the agent is notice to the principal. (§§ 264-266.)

There is a difference of opinion as to whether acceptance of a bonus by the agent affects the principal's security. (§ 267.)

§ 259. Scope of Chapter.

In the present work devoted primarily to the law relating to real estate brokers, it is impossible to do more than present the most general principles bearing upon the liability of a principal to third parties for the acts of his agent. The law applicable to the relation of principal and agent generally, is of such magnitude that eminent writers have devoted entire volumes to it, and for any detailed investigation reference should be had to the works of these writers.¹

¹ Story on Ag.; Mechem on Ag.; Clark & Skyles on Ag.; Reinhard on Ag.; Huffcut on Ag.

§ 260. Liability of Principal for Agent's Wrongdoing.

“ The principal is liable in a civil suit to third persons for the frauds, deceits, concealments, misrepresentations, torts, negligences and other malfeasances and misfeasances of his agent in the course of his employment, although the principal did not authorize, justify or participate in, or indeed know of such misconduct, or even if he forbade the acts, or disapproved of them. This rule of liability is not based upon any presumed authority in the agent to do the act, but upon the ground of public policy, and that it is more reasonable where one of two innocent persons must suffer from the wrongful act of a third person, that the principal who has placed the agent in the position of trust and confidence should suffer than a stranger. * * * All that is necessary to render the principal liable for the malfeasance or torts of the agent is that the tort must be committed in the course of the agency; not that the agency authorized it, or * * * that the employment afforded the means of committing the injury.”² The principal is not, however, liable for the willful trespass of his agent, committed without color of right or semblance of authority.³

§ 261. Liability of Principal who Accepts Benefits of Agent's Acts.

Acceptance by the principal of the fruits of the agent's efforts, though the principal be innocent, may place the principal in a position where he will be regarded as having assumed responsibility for the instrumentalities which the agent has employed to effect the transaction.⁴

² Lee v. Village of Sandy Hill, 40 N. Y. 448 (1869). But see § 271 *infra*.

³ Lee v. Village of Sandy Hill, 40 N. Y. 448 (1869); Erie City Iron Works v. Barber, 106 Pa. St. 138 (1884). See also Wheeler v. McGuire, 2 L. R. A. 810 (Ala. 1888).

⁴ See §§ 254-257 *supra*.

§ 262. Liability of Principal for Agent's Contracts.

The liability of the principal on contracts made by an agent depends upon the authority of the agent. The authority may be real or only apparent; the agent may be a general agent or a special agent, and upon these conditions depend the determination of whether or not the agent exceeded his authority.⁵

Where a broker contracts as agent for a principal who is named, the principal is liable to the party with whom the contract is made if the agent acted within the scope of his actual authority, or if the agent acted within an apparent authority, with which he was clothed by the principal, even though the act be contrary to private instructions and limitations not known to the other party.⁶

“It is a general principle of law of agency that a principal is not bound by the acts of the agent not within the actual or apparent scope of the agency, simply because the agent falsely asserts that they are within it.”⁷

“If the agency is special, and is known, it is the duty of the person dealing with the agent to inquire into the nature and extent of the authority conferred, and to deal with the agent accordingly. Where the special character of the agent is not known, and the principal has clothed the agent with apparent powers, strangers, in dealing with the agent, may assume that such apparent powers are possessed. The principal cannot, by private communications with his agent, limit the authority which he allows the agent to assume.”⁸ The question of the authority of a real estate broker to enter into a contract of sale has already been presented.⁹

“The authority of a general agent may be more or

⁵ See *Wheeler v. McGuire*, 2 L. R. A. 808 (Ala. 1888).

⁶ *Clark on Contracts*, 731. See also Ch. IV *supra* as to broker's authority to sign contract.

⁷ *Benedict v. Pell*, 70 App. Div. 45 (N. Y. 1902), (citing *Edwards v. Dooley*, 120 N. Y. 540 (1890)).

⁸ *Clark on Contracts*, p. 734.

⁹ See Ch. IV *supra* as to broker's power to sign contract.

less extensive; and he may be more or less limited in his action within the scope of it. The limitation of his authority may be public or private. If it be public, those who deal with him must regard it, or the principal will not be bound. If it be private, the principal will be bound, when the agent is acting within the scope of his authority, although he should violate his secret instructions. A special agent is one employed for a particular purpose only. He also may have a general authority to accomplish that purpose, or be limited to do it in a particular manner. If the limitation respecting the manner of doing it be public or known to the person with whom he deals, the principal will not be bound if the instructions are exceeded or violated. If such limitation be private, the agent may accomplish the object in violation of his instructions, and yet bind his principal by his acts."¹⁰

§ 263. Liability of Undisclosed Principal.

When property is sold to a person whom the vendor believes to be a purchaser, and he afterwards discovers that the person credited bought as agent for another, the vendor has a cause of action against the principal for the purchase price.¹¹ Thus, where a person knows that the owner of a particular property will not sell to him, and therefore has another person act as agent and buy in the property in the agent's name, the agent's mind is the principal's mind in the transaction, and the principal may be held for the balance of the unpaid purchase price.¹²

"As a general rule, where a written agreement not under seal is made on behalf of a principal not named, and the consideration has moved from him, it is compe-

¹⁰ *Bryant v. Moore*, 26 Me. 86, 87 (1846).

¹¹ *Kayton v. Barnett*, 116 N. Y. 625 (1889); *Borchertling v. Katz*, 37 N. J. Eq. 153 (1883).

¹² *Kayton v. Barnett*, *supra*.

tent for the principal to bring an action in his own name on such agreement, thus made for his benefit; and, on the other hand, even when the agent may himself be liable upon a written contract, because he has failed fully to disclose that he has made it on behalf of another, the principal on whose behalf he has made it may also be liable.”¹³

“ If an agent possessing due authority makes a contract in his own name, his principal, whether known or unknown, may be sued thereon, unless from the attendant circumstances it is the clear intent of the parties that exclusive credit is given to the agent, and that no resort shall in any event be had against the principal.”¹⁴ Where credit is given to an agent without knowledge that there is any principal, the principal, when discovered, may, at the election of the other party, be held on the contract if the election is exercised within a reasonable time.¹⁵

If the principal claims that the seller knew him to be such (principal) and gave credit exclusively to the agent, he assumes the burden of establishing this by clear proof, the assumption being that the credit is given to the principal.¹⁶ There are exceptions to the rule that an undisclosed principal may both sue and be sued upon a contract made in his behalf. The exceptions, so far as they affect real estate brokers' contracts, have already been noted.¹⁷

§ 264. Notice to Agent as Notice to Principal.

The principal is chargeable with all the knowledge the agent possesses in the transaction of the business he

¹³ *Nat. Life Ins. Co. v. Allen*, 116 Mass. 400 (1874), (citing *Huntington v. Knox*, 7 Cush. 371, 374; *Exchange Bk. v. Rice*, 107 Mass. 37, 43).

¹⁴ *Davis v. Lynch*, 31 Misc. 724 (N. Y. 1900).

¹⁵ *City Trust, Safe Dep. & Surety Co. v. American Brewg. Co.*, 70 App. Div. 511 (N. Y. 1902); *aff'd*, 174 N. Y. 486 (1903); *Mississippi Valley Const. Co. v. Abeles*, 112 S. W. 894 (Ark. 1908).

¹⁶ *Wasserman v. Bacon*, 80 App. Div. 505 (N. Y. 1903).

¹⁷ See § 46 *supra*.

has in charge.¹⁸ Or as another case puts it, a principal is chargeable with notice of all such facts as come to his agent's knowledge, whilst acting within the scope of his agency.¹⁹

When the members of a partnership are appointed agents, they are joint agents. Notice to one of two or more joint agents is notice to all.²⁰

“In an action between vendor and vendee, knowledge possessed by either the principal or the agent is, respectively, imputable to each other.”²¹ The rule rests upon the duty of the agent to disclose to the principal all the material facts coming to his knowledge with reference to the subject of his agency and upon the presumption that he has discharged that duty. “An agent owes a duty to his principal to disclose to him any information which he may have which may be relevant to that agency. The law conclusively presumes that the agent makes such disclosure, unless the agent has some private purpose to accomplish, the accomplishment of which would be imperiled thereby.”²²

§ 265. When Notice to Agent is Not Notice to Principal.

The presumption as to disclosure does not always arise, for there are several exceptions.²³ When the agent has no legal right to disclose a fact to his principal, or he is engaged in a scheme to defraud his principal, the presumption does not prevail.²⁴

¹⁸ *Adams v. Mills*, 60 N. Y. 539 (1875).

¹⁹ *Kauffman v. Robey*, 60 Tex. 310 (1883), (citing *Jones v. Banford*, 21 Iowa 217; *Fulton Bk. v. Canal Co.*, 4 Paige 127; *Ewell's Evans on Agency*, 164; *Le Neve v. Le Neve*, 2 Lead. Cases in Eq., pt. 1, 167, 168).

²⁰ *Whittenbrock v. Parker*, 102 Cal. 100 (1894), (citing *Wade on Law of Notice*, § 681; *Fulton Bk. v. N. Y., etc., Canal Co.*, 4 Paige (N. Y.) 127; *North River Bk. v. Ayman*, 3 Hill (N. Y.) 262; *Bank of U. S. v. Davis*, 2 Hill 451; *Natl. Security Bk. v. Cushman*, 121 Mass. 490).

²¹ *Mayer v. Dean*, 115 N. Y. 560 (1889).

²² *Crooks v. People's Natl. Bk.*, 72 App. Div. 335 (N. Y. 1902). See also § 248 *supra*.

²³ *Henry v. Allen*, 151 N. Y. 1 (1896).

²⁴ *Id.*; *Kauffman v. Robey*, 60 Tex. 311 (1883), (citing *Winchester v. Susquehanna R. Co.*, 4 Md. 231; *La Farge Ins. Co. v. Bell*, 22 Barb. (N. Y.) 54; *McCormick v. Wheeler*, 36 Ill. 114).

In *Pine Mountain Iron Co. v. Bailey*, 94 Fed. Rep. 258 (1899), the court said: "The rule that notice to the agent is notice to the principal has an exception as well established as the rule itself. It is that when the agent acts for himself, in his own interest, and adversely to his principal * * * neither notice to nor the knowledge of the agent can be lawfully imputed to the principal.²⁵ The reason of the general rule is that it is the duty of the agent to communicate to his principal the facts relative to any transaction in which he acts on his behalf, and that the law presumes that he has discharged his duty. But when the nominal agent commences to act in his own interest, and adversely to his principal, the presumption no longer obtains that he will communicate to him facts which might prevent the consummation of the negotiation which he is conducting on his own behalf, and the counter presumption that he will conceal them arises. As the reason for the rule no longer exists, the rule ceases to apply, and the exception prevails."

In *Benedict v. Arnoux*, 154 N. Y. 728 (1897), it was claimed that the knowledge of the agent was imputable to the principal. The court said: "This is true to a limited extent; so long as the agent acts within the scope of his employment in good faith, for the interest of his principal he is presumed to have disclosed to his principal all the facts that come to his knowledge as agent; but just as soon as the agent forms the purpose of dealing with his principal's property for his own benefit and advantage, or for the benefit and advantage of other persons who are opposed in interest, he ceases, in fact, to be an agent acting in good faith for the interest of his

²⁵ Citing *American Surety Co. v. Pauly*, 170 U. S. 133, 156; 18 Sup. Ct. 552; *Frenkel v. Hudson*, 82 Ala. 158; 2 So. 758; *Walte v. City of Santa Cruz*, 89 Fed. 619, 630; *Barnes v. Gas Light Co.*, 27 N. J. Eq. 33, 37; *Winchester v. R. R. Co.*, 4 Md. 231, 241; *Davis Improved Wrought Iron Wagon Wheel Co. v. Davis Wrought Iron Wagon Co.*, 20 Fed. 699, 702; *Thomson-Houston Electric Co. v. Capital Elec. Co.*, 56 Fed. 849, 853; *Commercial Bank v. Cunningham*, 24 Pick. 270, 276; *Mechem on Agency*, § 723.

principal and his action thereafter based upon such purpose is deemed to be in fraud of the rights of his principal, and the presumption that he has disclosed all the facts that have come to his knowledge no longer prevails." The court then quotes from *Henry v. Allen*, 151 N. Y. 1 (1896). But "a principal who knows that his agent is also acting as agent for the party adversely interested in a transaction with him, and yet consents that he may act as his agent, is estopped from denying the notice and knowledge which the agent has during the negotiation."²⁶

§ 266. Agent's Knowledge Obtained in Other Transactions.

As to how far a principal is held chargeable with knowledge of facts communicated to his agent, where the notice was not received or the knowledge obtained in the very transaction in question, there is conflict.²⁷

It has been held that "notice to and the knowledge of the agent or attorney acquired in prior transactions, and present in his mind while he is exercising the powers and discharging the duties of his agency, are notice to and the knowledge of his principal."²⁸ On the other hand, it is said "that he (the principal) is not chargeable with notice of such facts if they come to the knowledge of his agent whilst engaged in a transaction with which the principal has no concern, is equally well settled" as that the principal is chargeable with notice of all such facts as come to his agent's knowledge while acting within the scope of his agency.²⁹

²⁶ *Pine Mountain Co. v. Bailey*, 94 Fed. 260 (1899), (citing *Astor v. Wells*, 4 Wheat. 466; *Fitzsimmons v. Express Co.*, 40 Ga. 330, 336; *Alexander v. University*, 57 Ind. 466, 476; *Leekins v. Nordyke*, 66 Iowa 471, 475; 24 N. W. 1; *Adams Mining Co. v. Senter*, 26 Mich. 73, 77).

²⁷ See *Constant v. University of Rochester*, 111 N. Y. 611 (1888); *Kauffman v. Robey*, 60 Tex. 311 (1883); *Wittenbeck v. Parker*, 102 Cal. 100-103 (1894).

²⁸ *Pine Mountain Co. v. Bailey*, 94 Fed. 260 (1899).

²⁹ *Kauffman v. Robey*, *supra*.

§ 267. Usury of Agent.

While the rule prevails in some states that a loan is not rendered usurious by the fact that the lender's agent, without his authority, knowledge or participation, extorted money from the borrower upon the false pretense that part of it was a bonus for his principal,³⁰ the contrary or a modified view is taken in others.³¹

³⁰ *Estevez v. Purdy*, 66 N. Y. 446 (1876). See also *Bell v. Day*, 32 N. Y. 168 (1865); *Algur v. Gardner*, 54 N. Y. 360 (1873); *Condit v. Baldwin*, 21 N. Y. 219 (1860).

³¹ See *Clark & Skyles on Agency*, p. 1126. The following cases bear on the subject: *Sherwood v. Roundtree*, 32 Fed. Rep. 113; *Borcherling v. Terfz*, 40 N. J. Eq. 502; *White v. Dwyer*, 31 N. J. Eq. 40; *Coudert v. Flagg*, 31 N. J. Eq. 394; *Phillips v. Roberts*, 90 Ill. 492; *Payne v. Newcomb*, 100 Ill. 611; *Meers v. Stevens*, 106 Ill. 549; *Cox v. Life Ins. Co.*, 113 Ill. 382; *Boylston v. Bain*, 90 Ill. 283; *Wyllis v. Ault*, 46 Iowa 46; *New England Co. v. Hendrickson*, 13 Nebr. 574; *Cheney v. White*, 5 Nebr. 261.

CHAPTER XXVIII.

LIABILITY OF BROKER TO THIRD PARTIES.

§ 268. General Statement.

An agent is not liable to third parties for moneys properly received by him in the name and in the business of the principal. (§ 270.)

For misfeasance the agent is generally liable to third parties suffering thereby. (§ 271.)

If the agent act without authority, or beyond it, he becomes personally liable. (§§ 272-276.)

Where an agent makes a contract he impliedly agrees that he is authorized to make it. (§§ 272-275, 277.)

An agent in order to release himself from liability, should disclose his principal. (§ 277.)

In New York an unlawful intrusion on real property is a misdemeanor, and it is also a criminal offense for one to affix an advertisement to real property without the owner's consent. (§ 278.)

§ 269. Scope of Chapter.

In regard to the liability of agents to third parties, it may be said that the general subject is of too great magnitude to be more than touched upon here. For a full consideration of the subject, the special works on agency should be consulted.¹

§ 270. Liability of Agent for Moneys Received.

“An agent to whom money has been paid with a direction to hand it over to a third person, is accountable

¹ See § 259 *supra*.

only to his principal, and not to such third person, unless he has entered into a binding engagement with such third person which has given the latter a right of action against him.”² In *Fisher v. Meeker*, 118 App. Div. 452, 454 (N. Y. 1907), it was held that an agent acting within the scope of his authority cannot be held liable by persons other than his principal for moneys properly received by him in the name and in the business of the principal. Thus, where the plaintiff purchased goods of the defendant as agent to whom he paid the purchase price without any express promise by the agent to pay the sum to the principal and thereafter on demand by the principal again paid a portion of the purchase money, he cannot recover the overpayment from the agent. This, because payment to an agent who has authority to collect, is payment to the principal and an absolute discharge of the debt, and it is of no consequence to the debtor that the agent fails to account to the principal.

In the case cited,³ the court said: “The case of *Smith v. President, etc., of Essex County Bank*, 22 Barb. (N.Y.) 627, is a distinct authority against the right to sustain such an action. It was there held that a payment to an agent who has authority to collect is a payment to the principal and an absolute discharge of the debt, and that it is a matter of no sort of consequence, so far as the debtor is concerned, whether the agent accounts for it or misapplies it. In the case of *Hall v. Lauderdale*, 46 N. Y. 70, it was held that an action cannot be maintained against an agent, although, having money of his principal in his hands applicable to the payment of the debt of his principal, he refuses to pay it. The court, through Judge Andrews said: ‘The defendant was responsible to the principal, and to the principal alone, for any omission or neglect of duty in the matter of his agency.’ The

² Note in *Wells v. Collins*, 5 L. R. A. 531 (Wis. 1899).

³ *Fisher v. Meeker*, 118 App. Div. 452, 454 (N. Y. 1907).

case of *Colvin v. Holbrook*, 2 N. Y. 126,⁴ recognizes this same principle. The court there said: 'The rule, it is believed, is universal, that a known agent is not responsible to third persons for acts done by him in pursuance of an authority rightfully conferred upon him. The very notion of an agency proceeds upon the supposition that what a man may lawfully do by a substitute, when performed, is done by himself, and the individuality of the agent so far is merged in that of the principal. It is also settled, if anything can be established by authority, that an agent is not liable to third persons for an omission or neglect of duty in the matter of his agency, but that the principal is alone responsible.'⁵ There is a class of cases * * * in which the responsibility of agents and servants has been upheld. They are cases where the principal had no right to receive the money, and, of course, could confer none upon the agent, or where it was paid by mistake, or where the agent exceeded his authority, or was guilty of misfeasance, not as an agent or servant but as a wrong doer, or where payment was induced by a wrongful act of the agent or there was an explicit agreement to return it."

§ 271. Liability of Agent for Misfeasance and Nonfeasance.

"In *Van Antwerp v. Linton*, 89 Hun (N. Y.) 417, 419, the court, per Parker J., say: 'as between himself and his master he is bound to serve him with fidelity, and for a breach of his duty he becomes liable to the master, who in turn may be charged in damages for injuries to third persons occasioned by the nonfeasance of the servant. For misfeasance the agent is generally liable to third parties suffering thereby. The distinction between nonfeasance and misfeasance has been expressed by the

⁴ Criticised in note in 28 L. R. A. 433.

⁵ Citing *Cooper v. Tim*, 16 Misc. (N. Y.) 372.

courts of this State (New York) as follows: "If the duty omitted by the agent or servant devolved upon him purely from his agency or employment, his omission is only of a duty he owes his principal or master, and the master alone is liable. While if the duty rests upon him in his individual character and was one that the law imposed upon him independently of his agency or employment, then he is liable." *Burns v. Pathcal*, 75 Hun (N. Y.) 433.' The judgment was affirmed on the opinion below (157 N. Y. 716).''⁶

Agents for renting property and collecting rents are not liable for injuries to third persons sustained on the property, unless such agents are themselves guilty of misfeasance.⁷

In an Illinois case,⁸ the agents were subjected to liability under the following circumstances: certain real estate brokers were agents for renting certain premises and had complete control thereof, repairing same in their discretion. They rented the property and by the lease the tenants covenanted to keep the premises in repair. At the time of renting, however, the premises, and especially a door thereon, were in need of repair, and the agents agreed to repair it. This was not done, and an expressman delivering goods on the premises was so injured by the falling of this door that he died. The court in holding the agents responsible said: "An agent is liable to his principal only for mere breach of his contract with his principal, but he must have due regard to the rights and safety of third persons. He cannot in all cases find shelter behind his principal. * * * It was not his contract with the principal which exposes him to or

⁶ *Dunham v. City Trust Co.*, 115 App. Div. 588 (N. Y. 1906). See also *Hagerty v. Montana Ore Purch. Co.*, 98 Pac. 643 (Mont. 1908), (referring to *Ellis v. McNaughton*, 76 Mich. 237; 42 N. W. 1113; 15 Am. St. Rep. 308; *Baird v. Shipman*, 132 Ill. 16; 23 N. E. 384; 7 L. R. A. 128; 22 Am. St. Rep. 504; *Mayer v. Thompson-Hutchinson Bldg. Co.*, 104 Ala. 611; 16 So. 620; 28 L. R. A. 433; 53 Am. St. Rep. 88). See critical note in *Mayer v. Thompson Co.*, 28 L. R. A. 433 (1894), and see also *Hodgson v. St. Paul Plow Co.*, 50 L. R. A. 644.

⁷ *Minnis v. Younker*, 118 N. W. 532 (Iowa 1908).

⁸ *Baird v. Shipman*, 132 Ill. 16; 7 L. R. A. 128 (1890).

protects him from liability to third persons, but his common-law obligation to so use that which he controls as not to injure another. That obligation is neither increased nor diminished by his entrance upon the duties of agency, nor can its breach be excused by the plea that his principal is chargeable. If the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the management of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot escape this duty by abandoning its execution midway and leaving things in a dangerous condition by reason of his having so left them without proper safeguards.”⁹ The court then quotes from *Mechem on Agency*, § 572, to the effect that while an agent may not be liable to third persons for not doing that which is imposed upon him by virtue of his relation, he is so responsible for that which is imposed upon him by law, i. e., the same “not doing” which constitutes actionable negligence in any relation.¹⁰ The court also refers to *Campbell v. Portland Sugar Co.*, 62 Me. 552, as a parallel.

The agents' liability in the case of *Baird v. Shipman* is put upon the ground that when they rented the premises to the tenant in a dangerous condition, they voluntarily set in motion an agency which, in the ordinary and natural course of events would expose to injury persons entering the barn where the accident occurred. If the insecure condition had arisen after the letting to the tenant, the court said a different question would be presented, “but as it existed before and at the time of the letting, the owner or persons in control are chargeable with the consequences.”¹¹

⁹ Citing *Osborne v. Morgan*, 130 Mass. 102.

¹⁰ Citing *Lottman v. Barnett*, 62 Mo. 159; *Martin v. Benoit*, 20 Mo. App. 263; *Harriman v. Stowe*, 57 Mo. 93; *Bell v. Josselyn*, 3 Gray 309.

¹¹ Citing *Gridley v. Bloomington*, 68 Ill. 47; *Tomle v. Hampton*, 21 N. E. (Ill.) 800.

§ 272. Agent Liable for Improper Contract.

"It is the general rule that an agent, to avoid personal liability, must contract in such a form as to give a remedy against his principal, and if in making a contract in the name of his principal, he acts without authority, or beyond it, he becomes personally liable."¹² "When an agent assumes to act for an owner, he must see to it that his principal is legally bound by his act, and if he does not give a right of action against his principal, the law holds him personally responsible."¹³ An agent must so execute his authority as to bring about a contract mutually binding on the principal and the party with whom he contracts.¹⁴

Furthermore, the courts have held that where an instrument is executed on behalf of a body which has no existence, the party executing the instrument becomes liable, as where a lease was made on behalf of "the trustees of the German American Institute" as lessees and signed and sealed, "for the Board of Trustees by S. Kauffmann, treasurer," there being no trustees in fact, and only a mere voluntary association.¹⁵

§ 273. Liability of the Agent on Unauthorized Contract.

It is conceded that the agent is liable in some form for entering into an unauthorized contract. All that it is necessary for the agent to know, therefore, is that he is liable, and it will afford him little consolation to know that he is not liable in a certain form of action, but is under another. The practitioner, however, is interested in the form of the action he is expected to bring under such

¹² *Hall v. Lauderdale*, 46 N. Y. 70 (1871).

¹³ *Harrell v. Veith*, 13 N. Y. St. Rep. 738, 740 (1888).

¹⁴ *Simmonds v. Moses*, 100 N. Y. 140 (1885).

¹⁵ *Bartholomae v. Kauffmann*, 15 Jones & Spencer (47 N. Y. Super. Ct.) 552; *aff'd*, 91 N. Y. 654 (1883), no opinion. Similar instances of liability are *Fredenhall v. Taylor*, 23 Wis. 538 (1868), where a "committee" of an incorporated association acted; *Blakely v. Bennecke*, 59 Mo. 193 (1875), where signature was "Louis Bennecke, Capt. 49th Regt. Mo. Vols., Comdg. Post."

circumstances. As allowable limits of space will not permit of a prolonged presentation, we quote the concise but comprehensive statement contained in a popular textbook.

“An important exception to the rule” that an agent who contracts, as agent, for a named principal, cannot be sued on the contract “is where an agent contracts without authority, or for a non-existent or incapable principal. It is well settled that if a person contracts as agent on behalf of a principal who does not exist, or who cannot contract, or if he enters into a contract in excess of his authority, he is personally liable in some form to the other party. Whether he is liable *ex contractu*, or whether he is only liable in tort, is an unsettled question, and there is a conflict of opinion. In England and in some of our states, he is liable in contract if he acted in good faith and in tort if he acted in bad faith. If he believed that he had an authority which he did not in fact possess, he may be sued upon an implied warranty of authority. This is an implied or feigned promise to the other party that, in consideration of his making the contract, the professed agent undertakes that he has authority to bind his principal. ‘The unreality of this warranty of authority makes it open to criticism, since the promise therein involved was probably never present to the minds of either of the parties affected by it.’ Some of our courts have taken this view of the question, and have held that an agent acting without authority cannot be held liable in contract. ‘If one falsely represents that he has an authority by which another, relying on the representation, is misled, he is liable; and by acting as agent for another when he is not, though he thinks he is, he tacitly and impliedly represents himself authorized, without knowing the fact to be true, it is in the nature of a false warranty, and he is liable. But in both cases his liability is founded on the

ground of deceit and the remedy is by action of tort.' If the professed agent knew that he had not the authority which he assumed to possess, he may certainly be sued by the injured party in an action for deceit. As we have just seen, some courts hold that this is the injured party's only remedy, even where the professed agent acted in good faith."¹⁶

In New York it is held that the liability rests on the ground that the agent warrants his authority. The pretended agent may be held liable in an action for deceit or in an action for breach of warranty as to his authority.

A person acting as agent incurs liability as follows: (1) in a case of fraudulent misrepresentation that he has authority; (2) where the agent has no authority, although he intends no fraud; and (3) where a party undertakes to act as an agent *bona fide*, believing that he has authority, but in point of fact has no authority and therefore acts under an innocent mistake.¹⁷

§ 274. Ground of Agent's Liability for Unauthorized Acts.

In a case already cited,¹⁸ it was said: " 'Wherever a party undertakes to do any act as the agent of another, if he does not possess any authority from the principal therefor * * * he will be personally responsible therefor to the person with whom he is dealing for or on account of his principal. There can be no doubt that this is and ought to be the rule of law in the case of a fraudulent representation made by the agent, that he has due authority to act for the principal; for it is an intentional deceit. The same rule may justly apply where the agent has no such authority, and he knows it,

¹⁶ Clark on Contracts, pp. 738, 739. See also *LeRoy v. Jacobosky*, 136 N. C. 443; 67 L. E. A. 977 (1904), where many authorities are cited.

¹⁷ *Campbell v. Muller*, 19 Misc. 189; 43 N. Y. Suppl. 233 (1897). See also *White v. Madison*, 26 N. Y. 117 (1862); *Simmonds v. Moses*, 100 N. Y. 140 (1885).

¹⁸ *Campbell v. Muller*, *supra*.

and he, nevertheless, undertakes to act for the principal, although he intends no fraud. But another case may be put, which may seem to admit of more doubt; and that is where the party undertakes to act, as an agent, for the principal, *bona fide*, believing that he has due authority; but, in point of fact, he has no authority, and therefore he acts under an innocent mistake. In this last case, however, the agent is held by law to be equally as responsible as he is in the two former cases, although he is guilty of no intentional fraud or moral turpitude. This whole doctrine proceeds upon a plain principle of justice, for every person so acting for another, by a natural, if not by a necessary, implication, holds himself out as having competent authority to do the act; and he thereby draws the other party into a reciprocal engagement.¹⁹ The reason why the agent is liable in such case to the person with whom he contracts is that the party dealing with him is deprived of any remedy against the principal. The contract, though apparently with the principal, is not his in fact; and it is but just that the loss should be borne by the agent who contracted without authority.²⁰ The liability of the agent rests on the ground that he warrants his authority, not that the contract is to be deemed his own; and on the question of damages the agent's liability is not necessarily measured by the contract, but embraces all injury resulting from his want of power, which was held to include the costs of an unsuccessful action against the alleged principal.²¹

* * * The ground and form of the agent's liability have been the subject of much discussion, and there are conflicting decisions on the point. In Pennsylvania and certain other jurisdictions it has been held that when the

¹⁹ Citing *Story on Ag.*, § 264; and referring to *Ewell, Evan on Ag.*, 403; *Dusenbury v. Ellis*, 3 Johns. Cas. (N. Y.) 70; *White v. Madison*, 26 N. Y. 124; *Lord v. Van Gelder*, 16 Misc. Rep. 22; 37 N. Y. Supp. 688; *Farmers Co-op. Trust Co. v. Floyd*, 47 Ohio St. 525; 20 N. E. 110; *Baltzen v. Nicolay*, 53 N. Y. 467; *Simmonds v. Moses*, 100 N. Y. 140; 2 N. E. 640; *Taylor v. Nostrand*, 134 N. Y. 108; 31 N. E. 246.

²⁰ Citing *Baltzen v. Nicolay*, *supra*.

²¹ Citing *Taylor v. Nostrand*, *supra*.

agent makes a false representation of his authority, with intent to deceive, or where, with knowledge of his want of authority but without intending any fraud, he assumes to act as though he were fully authorized, he is personally liable to the other contracting party for the injury sustained, and such liability may be enforced either by action on the case for deceit, or by electing to treat him as a principal.²² The Court of Appeals of this state (New York) has held that 'the later and better considered opinion seems to be that his liability when the contract is made in the name of the principal, rests upon an implied warranty of his authority to make it, and the remedy is by an action for its breach.'²³

"In *Noe v. Gregory*, 7 Daly (N. Y.) 285, Judge Van Hoesen, delivering the opinion of the court, said: 'I think the law of New York now is that the pretended agent is only liable to an action of deceit, or to an action for breach of warranty as to his authority. Either form of action will apprise him that the question to be litigated is his authority to act for the person whom he represented to be his principal, and he may come prepared to try that issue.' "

§ 275. Warranty of Authority to Make Contract.

The principle is applicable to frequent situations. A few illustrative cases will suffice to show its application. In *Rowland v. Hall*, 121 App. Div. 459 (N. Y. 1907), the agent signed a contract of sale, supposing that an "estate" owned the property, for he had dealt with the supposed "executor" of the estate and collected the rents and managed the property for him for years. Meanwhile, the "executor," who had "power of attorney" from the owners, conveyed the property to a third

²² Citing *Kroeger v. Pitcairn*, 101 Pa. St. 311; 8 Walt, Act. and Def., 62.

²³ Citing *Baltzen v. Nicolay*, 53 N. Y. 467.

party and the third party refused to recognize the contract. It was held that the agent was liable for the payment made to him by the purchaser on account of the purchase price.

In *Elliott v. Asiel*, 120 App. Div. 829 (N. Y. 1907), the defendant entered into an agreement to sell real estate and designated the vendor as "Estate of Hannah Asiel," and signed the contract "Jacob Asiel, administrator of the Estate of Hannah Asiel." As ordinarily an administrator has nothing to do with the real estate of the deceased,²⁴ and in this case the heirs refused to recognize the contract, a dismissal of the purchaser's complaint was reversed, the court saying that the contract was a personal contract of Jacob Asiel; that as administrator, without special leave of the surrogate, he had nothing to do with the real estate and had no power to make the contract. "It purported to be a contract of the estate, and the administrator by making it implied that he as administrator was authorized to make such a contract and was responsible to the *defendant* (sic) for any damages sustained in consequence of a breach of that implied agreement."²⁵

§ 276. Reason of Liability of Agent for Unauthorized Acts.

"The rule, that the agent is liable when he acts without authority, is founded upon the supposition that there has been some wrong or omission on his part, either in misrepresenting, or in affirming, or in concealing the authority under which he assumes to act."²⁶ If the agent acts within his instructions, and in good faith, especially when the facts are equally known to both parties,

²⁴ See § 207 *supra*.

²⁵ See as to broker's authority to sign contract, Ch. IV *supra*.

²⁶ *Hall v. Lauderdale*, 46 N. Y. 70 (1871).

he is not personally responsible although it may happen that the authority itself is void.²⁷

In *Baltzen v. Nicolay*, 53 N. Y. 467 (1873), where the agent set up the statute of frauds, no written contract having been made, the court, after citing *White v. Madison*, 26 N. Y. 117 (1862),²⁸ says: "The reason why the agent is liable in damages to the person with whom he contracts, when he exceeds his authority, is that the party dealing with him is deprived of any remedy upon the contract against the principal. The contract, though in form the contract of the principal, is not his in fact, and it is but just that the loss occasioned by there being no valid contract with him should be borne by the agent who contracted for him without authority. In order to make the agent liable in such a case, however, the unauthorized contract must be one which the law would enforce against the principal if it had been authorized by him."²⁹ Otherwise the anomaly would exist of giving a right of action against the assumed agent for an unauthorized representation of his power to make a contract, when the breach of the contract itself, if he had been authorized to make it, would have furnished no ground of action. That the agent who makes a contract for an undisclosed principal is personally bound by it, although the party dealing with him may know the general fact that he is acting as agent, is well settled; nor does the fact that the agent is an auctioneer, and that the contract arises upon a sale by him as such, withdraw it from the operation of the rule."

Where an agent signs a contract of sale which the owner repudiates, it does not deprive the agent of compensation for services if he produced a purchaser ready, willing and able.³⁰

²⁷ *Hall v. Lauderdale*, 46 N. Y. 70 (1871).

²⁸ See §§ 273, 274 *supra*.

²⁹ Citing *Dung v. Parker*, 52 N. Y. 494.

³⁰ *Monroe v. Snow*, 131 Ill. 135 (1891). And see §§ 117-119 *supra*.

§ 277. Liability of Agent Acting for Undisclosed Principal.

“ The general rule is that one who acts as agent for another, in order to release himself from liability, should disclose his principal, because otherwise it would be presumed that he intended to bind himself personally. In other words, it is not the duty of one dealing with an agent to find out whether he is acting in the transaction in that capacity, or as principal;³¹ but it is the duty of the agent, if he desires to relieve himself from personal liability, to disclose the name of his principal in the transaction.”³² “ One who contracts as principal cannot escape liability, certainly not after a suit is brought, by proving that he was acting as an agent.”³³

“ It is a well recognized rule of law that where an agent conceals the fact of his agency and enters into a contract in his own name, he may be treated as the principal by the party with whom he deals, and may be held liable on the contract to the same extent as if he were in fact the principal in interest.”³⁴ “ It is well settled that when the agency is disclosed, and the contract relates to the matter of the agency, and is within the authority conferred, the agent will not be personally bound, unless, upon clear and explicit evidence of an intention to substitute or to superadd his personal liability for or to that of the principal.”³⁵

“ In case of written agreements executed by an agent, the agent is, in general, personally bound, if the instrument can have no legal operation against the principal. But in construing oral agreements made by an agent,

³¹ This statement should not be confused with the principle that one who deals with an agent, knowing him to be such, is bound to know the limitations placed upon his authority. See § 28 *supra*.

³² Crosett v. Carleton, 48 N. Y. Suppl. 309 (1897). See also § 263 *supra*.

³³ McGovern v. Bennett, 146 Mich. 562 (1906), (citing White v. Boyce, 21 Fed. 228; McKnown v. Gettys, 25 Ky. Law Rep. 2070).

³⁴ Whitney v. Woodmansee, 15 Idaho 739 (1909), (citing 2 Clark & Skyles on Ag., § 568; Story on Ag., §§ 266, 267; Murphy v. Helmrich, 66 Cal. 69; 4 Pac. 958; Ye Seng Co. v. Corbitt, 9 Fed. 423; 7 Saw. 368).

³⁵ Whiting v. Saunders, 23 Misc. 332 (N. Y. 1898), (citing Hall v. Lauderdale, 46 N. Y. 74).

courts give effect to the real intention of the parties, unembarrassed by technical rules of construction; and when the act is within the authority, the presumption is that the agent intends to bind the principal and not himself." ³⁶

In the editorial note in *Wheeler v. McGuire*, 2 L. R. A. 811 (Ala. 1888), it is said: "An agent may become liable on contracts made by him in that capacity: first, where the principal is not known; secondly, where there is no responsible principal (except in the case of public agents); thirdly, where he becomes liable by an undertaking of his own." This note also sets forth the following propositions, citing authorities therefor: "Where an agent in his dealings with third parties does not disclose his principal he will be personally liable on the contract.

"The agent will be liable on a contract entered into for an undisclosed principal, even if it is well known to the third party that he acts only as an agent.

"When a party deals with the agent, without any disclosure of his agency, he may elect to treat the after discovered principal as the person with whom he contracted.

"He has a right, within a reasonable time, to elect to proceed against the principal, unless in the meantime, with full knowledge as to who was the principal, and with the power of choosing between him and the agent, he had elected to treat the agent alone as his debtor.

"After a third party has elected whom to sue, and has sued either the agent or the principal to judgment, he cannot after that sue the other, whether the suit has been successful or not.

"If, at the time of the sale, the seller knows, not only that the person who is nominally dealing with him is not principal, but agent, and also knows who the principal really is, and notwithstanding all that knowledge, chooses to make the agent his debtor, dealing with him

³⁶ *Hall v. Lauderdale*, 46 N. Y. 70 (1871).

alone, the seller cannot charge the principal, having once elected to sue the agent."

Mr. Clark lays down these propositions: Where an agent contracts as agent for a principal who is named, the agent cannot sue in his own name on the contract, except where he is the real principal, though named as agent, or where he has a special interest in the subject matter of the contract. The agent cannot be sued on the contract, except where the contract is under seal, and he has made himself a party to it, or, in some jurisdictions, where he contracted for a foreign principal, or where he has exceeded his authority or has contracted without authority, or where the contract was really made with him personally, though he is described as agent.³⁷

§ 278. Unlawful Intrusion on Real Property.

No attempt is made in the present volume to present the criminal statutes of the several states relating to offenses against real property. A provision of the New York statutes follows, in order to illustrate how the criminal laws prohibiting trespass might possibly affect the broker. As will be noted, going upon property of another and affixing thereon "to let" or "for sale" signs without being authorized may subject a real estate agent to criminal liability. Since we are not aware of any reported opinion judicially declaring that the acts above mentioned are within the provisions given, we merely quote the provisions without comment.

"A person, who intrudes upon any lot or piece of land within the bounds of a city or village, without authority from the owner thereof * * * is guilty of a misdemeanor." ³⁸

"A person who places upon or affixes to, or causes or

³⁷ Clark on Contracts, pp. 731, 732.

³⁸ N. Y. Penal Law, § 2036.

procures to be placed upon or affixed to, real property not his own, or a rock, tree, wall, fence, or other structure thereupon, without the consent of the owner, any words, characters or device, as a notice of, or reference to, any article, business, exhibition, profession, matter or event, is punishable by imprisonment for not more than six months, or by a fine of not more than two hundred and fifty dollars, or by both. The placing or affixing of any words, characters, device or notice, of any article, business or other thing, to or upon any property or place specified in this section, is presumptive evidence that the proprietor, vendor or exhibitor thereof caused or procured the same to be so placed or affixed.”³⁹

³⁹ N. Y. Penal Law, § 121.

PART IV.—FRAUD.

CHAPTER XXIX.

WHAT CONSTITUTES FRAUD. ACTS NOT USUALLY CONSIDERED FRAUDULENT.

§ 279. General Statement.

Fraud is a false representation or non-disclosure of a material fact, made with intent to deceive and operating to deceive another party to his injury. Fraud may be committed not only by word of mouth, but by means of writings, pictures, maps, and the like. (§§ 280, 281.)

Generally, mere silence is not fraud; neither can fraud be based upon mere expressions of hope, expectation and the like, nor upon promises solely, nor as a general rule upon naked assertions of value. (§§ 282-291.)

§ 280. What is Fraud?

Fraud has been aptly defined to be “a false representation of a material fact, or non-disclosure of a material fact under such circumstances that it amounts to a false representation made with knowledge of its falsity, or in reckless disregard of whether it is true or false, or as of personal knowledge, with the intention that it shall be acted upon by the other party, and which is acted upon by him to his injury.”¹ Picture cards, maps, signs and photographs may be the instruments of fraudulent mis-

¹ Clark on Contracts, 324; Maupin on Marketable Titles (2d Ed.), Ch. XI.

representations. As for instance, where they tend to mislead and produce a false impression as to the contiguity of the property to other highly developed and improved property.²

Fraud, to vitiate a contract, must be material and must relate distinctly and directly to the contract, and must affect its very essence and substance.³ Misrepresentation with intent to deceive is the legal equivalent of actual fraud.⁴ "Where a party to a contract in making a false representation is honestly mistaken, there is no ingredient of fraud in the case. This rule, however, does not permit him to make false statements recklessly or without some foundation for belief in them. Before one positively affirms the existence of a fact, he must proceed upon reasonable inquiry, and have some apparently good ground for his affirmation."⁵ A mistake or innocent misrepresentation is enough for rescission of the contract.⁶

§ 281. Broker's Frauds.

To attempt to enter in detail into the forms which fraud and misrepresentation may take with respect to real estate transactions, would be an impossible task. It would require an exceedingly lively imagination to speculate as to the various methods by which fraud might be perpetrated. Yet it may be suggested that there are certain formulæ in vogue in real estate transactions which are not infrequently resorted to and which are or may be fraudulent.

² *Scarsdale Pub. Co. v. Carter*, 83 Misc. 277 (N. Y. 1909).

³ *Smith v. Countryman*, 30 N. Y. 670 (1864); *Press v. Hair*, 133 Ill. App. 534 (1907); *Meeks v. Garner*, 11 L. R. A. 196 (Ala. 1890); *Dawe v. Morris*, 4 L. R. A. 158 (Mass. 1889).

⁴ *Forster v. Wilhusen*, 14 Misc. 520 (N. Y. 1895), (citing *Kley v. Healy*, 127 N. Y. 555, 561 (1891)).

⁵ *Hammond v. Pennock*, 61 N. Y. 150, 151 (1874); *Erie City Iron Works v. Barber*, 106 Pa. St. 138 (1884); *Cabot v. Christie*, 42 Vt. 121 (1869).

⁶ *Forster v. Wilhusen*, 14 Misc. 520 (N. Y. 1895), (citing *Kountze v. Kennedy*, 147 N. Y. 124 (1895); *Crowe v. Lewin*, 95 N. Y. 423 (1884)). And see *Maupin on Marketable Titles* (2d Ed.), § 105.

Those experienced in real estate matters, and very many with but a single experience, will find no difficulty in subscribing to the general statement that the methods sometimes invoked to bring about a sale, are not all that might be desired. Many vendors—not to mention real estate brokers—insist that the truth should always be told, but it must be admitted that all the truth is not always told.

§ 282. Silence and "Concealment."

The general rule is that mere silence is no fraud, except where the silence amounts to an affirmation that a state of things exists which does not.⁷ That which is ethical is not always the law, nor does the law always correspond with the ethical. If a man is about to sell his property, what information ought he to give the proposed buyer, and what information may he properly withhold? This presents a question of ethics on the one hand and a question of law on the other. It is not a novel question. Even Cicero, who practised law 1900 years ago, seems to have had occasion to go into the question, and we may assume from what he says that even in those days some of the real estate agents "knew the business." He says in the third book of the *De Officiis*:

"A good man sells a house on account of some defects, of which he himself is aware and others ignorant. Perhaps it is unhealthy, and is supposed to be healthy,—it is not generally known that snakes make their appearance in all the bedrooms,—it is built of bad materials, and is in a ruinous condition; but nobody knows this except the owner. I ask, if the seller should have failed to tell these things to the buyer, and should thus have sold his house for a higher price than he could reasonably have expected, whether he would have acted unjustly or

⁷ Cooley on Torts (2d Ed.), pp. 557-565.

unfairly? 'Yes, he would,' says Antipater; 'for what is meant by not putting into the right way one who has lost his way (which at Athens exposed a man to public execration), if it does not include a case in which a buyer is permitted to rush blindly on and through his mistake to fall into a heavy loss by fraudulent means? It is even worse than not showing the right way; it is knowingly leading another into the wrong way.' Diogenes, on the other hand says: 'Did he who did not even advise you to buy, force you to buy? He advertised for sale what he did not like; you bought what you did like. Certainly, if those who advertise a good and well-built house are not regarded as swindlers, even though it is neither good nor properly built, much less should those be so regarded who have said nothing in praise of their house. For in a case in which the buyer can exercise his own judgment, what fraud can there be on the part of the seller? And if all that is said is not to be guaranteed, do you think that what is not said ought to be guaranteed? What could be more foolish than for the seller to tell the defects of the articles that he is selling? Nay, what so absurd as for an auctioneer, by the owner's direction, to proclaim, "I am selling an unhealthful house?"' Thus, then, in certain doubtful cases the right is defended on the one side; on the other, expediency is urged on the ground that it is not only right to do what seems expedient, but even wrong not to do it. This is the discrepancy which seems often to exist between the expedient and the right. But I must state my decision in these cases; for I introduced them, not to raise the inquiry concerning them, but to give their solution. It seems to me, then, that neither that Rhodian corn-merchant nor this seller of the house ought to have practiced concealment with the buyers. In truth, reticence with regard to any matter whatever does not constitute concealment; but concealment consists in willingly hiding from others for your own ad-

vantage something that you know. Who does not see what sort of an act such concealment is, and what sort of a man he must be who practices it? Certainly this is not the conduct of an open, frank, honest, good man, but rather of a wily, dark, crafty, deceitful, ill-meaning, cunning man, an old rogue, a swindler. Is it not inexpedient to become liable to these so numerous and to many more bad names? ”⁸

If the fear of having the names in Cicero's category applied to them, deterred many of the Romans from the conduct discussed, how different they must have been from some of the brokers we meet in our day!

Cicero, though he handles the subject so pleasantly, does not after all give a decided opinion, for does he not in effect argue that *concealment* is wrong? But what concealment is, he leaves for others to determine. The cases in our own courts are, as a whole, hardly more explicit. In *People's Bank v. Bogart*, 81 N. Y. 107 (1880), it is said that “the law requires disclosure to be made *only when there is a duty to make it*, and this duty is not raised by the mere circumstance that the undisclosed fact is material, and is known to the one party and not to the other, or by the additional circumstance that the party to whom it is known, knows that the other party is acting in ignorance of it.” The court quotes Story on Contracts to the effect that “the general rule both of law and equity, in respect to concealments, is that mere silence with regard to a material fact *which there is no legal obligation to divulge* will not avoid a contract, although it operates to the injury of the party from whom it is concealed.”

§ 283. Requirements as to Disclosure.

“The rule is well established that where persons are

⁸ Wilkinson's Latin Classics, Vol. 2, pp. 262, 263.

dealing with each other upon equal terms, and no confidential relation exists between them, neither is bound to disclose superior information he may have respecting the transaction, and, in the absence of fraud or deception to induce the contract, the court can afford no relief.”⁹

“The following propositions may be stated as embodying the principal features of the decisions as to what acts or conduct of the vendor amount to fraud in respect to the title which he undertakes to convey: (1) The vendor is guilty of fraud if he conceals a fact material to the validity of the title, lying peculiarly within his own knowledge, *and which it is his duty to disclose*. It is as much a fraud to suppress the truth as it is to utter a falsehood. The question, what facts the seller must disclose, is capable of much refinement. Obviously it cannot be determined by any precise rule. In every case that arises the question is one of fact to be solved by all the circumstances which surround the transaction, among which, perhaps, the most important are the relations of trust and confidence which the parties bear to each other, and the inequalities in their respective business capacities, or opportunities for information respecting the title.”¹⁰

§ 284. Fraudulent Concealment by the Purchaser.

Cases involving concealment on the part of the purchaser, though less frequently before the courts than those in which the vendor's concealment is complained of, present interesting and sometimes difficult questions. “It has long been settled in common law jurisdictions that, in general, the mere failure of a buyer to disclose something extrinsic or intrinsic to the thing bought, known to him and not known to the seller, is not in legal

⁹Jones v. Stewart, 87 N. W. 13 (1901).

¹⁰Maupin on Marketable Titles (2d Ed.), pp. 238-240.

sense fraud.”¹¹ But while mere reticence on the part of the purchaser does not amount to a fraud, very little is sufficient to defeat the application of that principle. A single word which tends to mislead the vendor, or even a nod, or a wink, or a shake of the head, or a smile from the purchaser, may be enough.¹²

In *Crompton v. Beedle*, 75 Atl. 333 (Vt. 1910), the owner of land lived some distance therefrom. The defendant, being aware of a valuable but undeveloped quarry on the land, the existence of which the owner was ignorant of, obtained an option to purchase, and subsequently a deed of the land, upon the representation that it was of little value and that the only reason he desired the land was because it adjoined some land belonging to him, and that the only way of access thereto was over his land, and that the passing to and fro for such access annoyed him and his family. It was held that the vendor, living at a distance, being thrown off her guard by reliance on the representations and therefore not inquiring as to the real value of the land, might rescind on discovering the real situation.¹³ “An action will lie for fraudulent representations made by the prospective purchaser of land as to its value and condition; the land being at a distance from the place of purchase, and the vendor being ignorant as to its condition and value, and relying upon the truthfulness of such representations.”¹⁴

It seems that this question would not be affected by the fact that no confidential relations existed between the parties.¹⁵ “Unfairness and fraud may be collected from

¹¹ *Crompton v. Beedle*, 75 Atl. 333 (Vt. 1910), (citing *Fox v. Mackreth*, 2 Bro. C. C. 420; *Harris v. Tyson*, 24 Pa. 347; 64 Am. Dec. 661; *Smith v. Beatty*, 37 N. C. 456; 40 Am. Dec. 435; *Laidlaw v. Organ*, 2 Wheat. 178; 4 L. Ed. 214).

¹² *Crompton v. Beedle*, *supra*.

¹³ This case also refers to the following authorities: *Paddock v. Strobbridge*, 29 Vt. 470; *Maynard v. Maynard*, 49 Vt. 297; *Etting v. Bk. of U. S.*, 11 Wheat. 59; 6 L. Ed. 419; *Turner v. Harvey*, Jacob 169, 178 (Eng.); *Walters v. Morgan*, 3 De G. F. & J. 718; *Livingston v. Peru Iron Co.*, 2 Paige (N. Y.) 390; *Haygarth v. Wearing*, L. R. 12 Eq. 320; *Mountain v. Day*, 91 Minn. 249; 97 N. W. 883.

¹⁴ Syllabus by the court in *Mountain v. Day*, 91 Minn. 249; 97 N. W. 883, quoted in *Crompton v. Beedle*, 75 Atl. 334 (Vt. 1910).

¹⁵ *Crompton v. Beedle*, *supra*.

a variety of circumstances, and it is ordinarily enough to establish fraud that a vendee has actively attempted to ensnare, and has in fact ensnared, the vendor into the making of an unconscionable contract. Where concealment of an essential thing is effected by an industrious course of misleading and deceptive talk or conduct, there is fraud against which equity will relieve. The law distinguishes between passive concealment and active concealment. Where one has full information, and represents that he has, if he discloses a part of his information only, and by words or conduct leads the one with whom he contracts to believe that he has made a full disclosure, and does this with intent to deceive and overreach and to prevent investigation, he is guilty of fraud against which equity will relieve, if his words and conduct in consequence of reliance upon them bring about the result which he desires.”¹⁶

§ 285. Promises, Hopes, etc.

“It is a familiar rule, where representations consist in mere expressions of hope, expectations and the like, that the party to whom they are made is not legally justified in relying upon them and assuming them to be true. The representation of what one expects, or hopes, as about to take place, in order to induce action on the part of the person to whom made, may be honest, or may be fraudulent. If the former, then no action will lie upon the ground of fraud, if the expectation is not realized. If the representation is made fraudulently and with the intention to deceive, then the evidence must exhibit it in that character. For the presumption will be, in the absence of such evidence, that the person making the representation did so honestly, however extravagant in his hopes.”¹⁷

¹⁶ *Crompton v. Beedle*, 75 Atl. 334, 335 (Vt. 1910).

¹⁷ *Kley v. Healy*, 149 N. Y. 351, 352 (1891); *Chambers v. Mitchell*, 123 Ill. App. 597, 598 (1905).

A representation that certain title companies would lend a certain amount on mortgage upon the property is promissory in its nature. A person has no right to rely thereon. So it is held in *Kreshover v. Berger*, 62 Misc. 613 (N. Y. 1909). But in the same case, on appeal,¹⁸ it was held that a statement that a title insurance company had accepted a certain loan on the premises, when in fact it had declined "to pass" a loan by reason of defects in the construction of a wall, is a material misrepresentation. Where the representations were that the enterprise in which the plaintiff was invited to put his capital "would yield large profits" or that "it was a good paying business," they were held promissory and matter of opinion, having respect to the development of the future.¹⁹

§ 286. Promises and False Representations.

But even if reliance is placed upon the mere promises of the vendor as well as upon his false representations, still a cause of action for fraud may be maintained provided the representations have a material effect in accomplishing the deception. It is not necessary that they should be the sole inducing cause.²⁰

And while fraud cannot be founded solely upon a promise not performed, even if the promisor never intended to fulfill the same, yet a statement of a present existing intent may be made the basis of fraud. Thus in *Adams v. Gillig*, 131 App. Div. 494 (N. Y. 1909), a grantee of land situated in the residential part of a city, while negotiating the contract of sale, and having a present and existing intention to erect an automobile garage, specifically represented to the grantor that he intended to use the property for dwelling houses and for

¹⁸ *Kreshover v. Berger*, 135 App. Div. 27 (N. Y. 1909).

¹⁹ *Sparman v. Keim*, 83 N. Y. 245 (1880).

²⁰ *Kley v. Healy*, 127 N. Y. 561 (1891).

no other purpose. Held there was a fraudulent misrepresentation as to an existing fact.²¹

§ 287. Opinions; Expressions of Value.

We have seen that generally there can be no fraud predicated upon expressions of hope, or expectation, and so there can generally be no fraud based upon expressions of value, for an expression of value is nothing more than an opinion.²² In one man's opinion the value of a piece of land may be far different than in another's.

§ 288. Assertion of Value, Though False, Not Ordinarily Fraudulent.

"Assertions must be considered," says the court in *Conlan v. Roemer*, 52 N. J. L. 55 (1889), "in the light of the subject-matter in respect to which they are made. The general doctrine is that a misrepresentation unconnected with any misrepresentation of kind, quality or quantity, by the vendor, though false, affords no cause of action. Every person reposes at his peril in the opinion of others when he has equal opportunity to form his own judgment. Mere expressions of matters of opinion, however strongly or positively made, though they are false, do not constitute actionable fraud. Statements of mere matters of opinion or judgment, although known to be false, do not constitute a fraud in the absence of relations of trust and confidence.²³ It is not fraud to aver strongly that the purchaser will make a good and profitable purchase by accepting the vendor's offer. It may be otherwise if in connection with the expression of opinion there

²¹ Cf. *Brown v. Honiss*, 74 N. J. L. 508 (1906).

²² *Page v. Parker*, 43 N. H. 368 (1861); *Hetland v. Bilstad*, 118 N. W. 423 (Iowa 1908); *State Bank v. Brown*, 119 N. W. 83 (Iowa 1909); *Bosley v. Monahan*, 112 N. W. 1102 (Iowa 1907); *Mayo v. Wahlgreen*, 50 Pac. 43 (Colo. 1897); *Hecht v. Metzler*, 48 Pac. 40 (Utah 1897); note in *Denning v. Darling*, 2 L. R. A. 743 (Mass. 1889).

²³ Citing *Wise v. Fuller*, 2 Stew. Eq. 257.

were false assertions of fact calculated, if true, to give a basis for the opinion.”²⁴

“The rule is well settled that a naked assertion by a vendor of the value of property offered for sale, even although untrue of itself, and known to be such by him, unless there is a want of knowledge by the vendee, and the sale is made in entire reliance upon the representations made, or unless some artifice is employed to prevent inquiry or the obtaining of knowledge by the vendee, will not render the vendor responsible to the vendee for damages sustained by him.”²⁵

§ 289. Opinions Amounting to Affirmations of Fact.

But opinions may sometimes amount to representations of fact. In *People v. Peckens*, 153 N. Y. 591 (1897), it was said: “As a general rule, the mere expression of an opinion, which is understood to be only an opinion, does not render a person expressing it liable for fraud.”²⁶ “But,” continues the court, “where the statements are as to value or quality, and are made by a person knowing them to be untrue, with an intent to deceive and mislead the one to whom they are made, and he is thus induced to forbear making inquiries which he otherwise would, they may amount to an affirmation of fact rendering him liable therefor. In such a case, whether a representation is an expression of opinion or an affirmation of a fact is a question for the jury. The rule that no one is liable for an expression of an opinion is applicable only when the opinion stands by itself as a distinct thing. If it is given in bad faith, with knowledge of its untruthfulness to defraud others, the person making it is liable, especially when it is as to a fact affect-

²⁴ Citing *McAleer v. Horsey*, 35 Md. 439.

²⁵ *Chrysler v. Canaday*, 90 N. Y. 279 (1882); *Seis v. Plaisantin*, 52 App. Div. 206 (N. Y. 1900).

²⁶ See also *Press v. Hair*, 133 Ill. App. 534 (1907), (citing *Buschman v. Codd*, 52 Md. 202; *Robertson v. Parks*, 76 Md. 118; *Wade v. Ringo*, 122 Mo. 322). See also note to *Denning v. Darling*, 2 L. R. A. 743 (Mass. 1889).

ing quality or value and is peculiarly within the knowledge of the person making it." ²⁷

§ 290. Assertions and Opinions Fraudulent in Intent.

In *Hetland v. Bilstad*, 118 N. W. 423, 424 (Iowa 1908), it was said: "Parties in negotiating deals have the right to exalt the value or quality of their own property to the highest point credulity will bear, provided their efforts in this line go no further than puffing or praise which the vendor may properly indulge in; but statements of value or quality may be made with the purpose of having them accepted as of fact, and, if this is done, and so relied on, they are to be treated as the parties designed they should be, namely, representations of fact."²⁸ In that case the court said: "The evidence in behalf of plaintiff clearly indicated the intention of Walsh that his assertion of the value of the land should be acted upon as true, and not merely as his estimate, and, if so, and it was knowingly false and induced an exchange by plaintiff to her damage, it was actionable." This is fully sustained by the authorities.²⁹ The rule is forcibly stated in *Murray v. Tolman* (162 Ill. 417; 41 N. E. 748): "Where the vendee is wholly ignorant of the value of the property, and the vendor knows this, and also knows that the vendee is relying on his (vendor's) representations as to the value, and such representation is not a mere expression of opinion, but is made as a statement of fact, which statement the vendor knows to be untrue, such a statement is a representation by which the vendor is bound." "

²⁷ Citing *Watson v. People*, 87 N. Y. 561; *Simar v. Canaday*, 53 N. Y. 298; *Hickey v. Morrell*, 102 N. Y. 454, 463; *Schumacher v. Mather*, 133 N. Y. 590, 595. See also *Maupin on Marketable Titles* (2nd Ed.), § 106.

²⁸ Citing *Mattauch v. Walsh*, 136 Iowa 225; 113 N. W. 818.

²⁹ Citing *Hickey v. Morrell*, 102 N. Y. 463; 7 N. E. 325; 55 Am. Rep. 824; *Culley v. Jones*, 164 Ind. 168; 73 N. E. 94; *Murray v. Tolman*, 162 Ill. 417; 41 N. E. 748; *McKnight v. Thompson*, 39 Neb. 752; 58 N. W. 453; *People v. Peckens*, 153 N. Y. 576; 47 N. E. 883; *Horton v. Lee*, 106 Wis. 439; 82 N. W. 360; *McDonald v. Smith*, 139 Mich. 211; 102 N. W. 669; *Stack v. Nolte*, 29 Wash. 188; 69 Pac. 753; *Mountain v. Day*, 91 Minn. 249; 97 N. W. 883; *Morgan v. Dinges*, 23 Neb. 271; 36 N. W. 544; 8 Am. St. Rep. 121. See also *Crompton v. Beedle*, 75 Atl. 335 (Vt. 1910).

The law on this subject is, however, not free from conflict, and some of the authorities do not regard an expression of value as a basis for fraud unless the property is at a distance and the vendor prevents the vendee from seeking information.³⁰

§ 291. When Expression of Opinion is Fraudulent.

All that can be said, therefore, when referring to the subject in a general way, is that an expression of opinion or of value may sometimes constitute fraud.³¹ "There is no certain rule by the application of which it can be determined when false representations constitute matters of opinion or matters of fact. Each case in a large measure must be judged upon its own circumstances."³² But "the opinion of an expert is such a fact which he cannot knowingly misstate without incurring legal liability."³³

A broker was held liable for misrepresenting the value of land and thus inducing a person to loan money thereon on mortgage, to the loss of the lender.³⁴

Dolan v. Cummings, 116 App. Div. 787 (N. Y. 1907), presents a case showing a still different phase, where it may be said that there was fraud with respect to the value of property. The headnote, which tersely gives the law of the case, states: "A relation of confidence and trust exists between brothers and sisters who are tenants in common of lands, and if one tenant conceals the fact that he has had a specific offer for the real estate and induces his co-tenants to sell their interest to him at a much lower value, they are entitled to rescind the sale on discovering the offer. Under such circumstances it

³⁰ *Hetland v. Billstad*, 118 N. W. 424 (Iowa 1908).

³¹ See also *Snively v. Meixsell*, 97 Ill. App. 370-373 (1901), where many authorities are cited.

³² *Reeves v. Corning*, 51 Fed. Rep. 774, quoted in *Snively v. Meixsell*, *supra*.

³³ *Conlan v. Roemer*, 52 N. J. L. 58 (1889), (citing *Picard v. McCormick*, 11 Mich. 68; *Kost v. Bender*, 25 Mich. 515; *Stewart v. Stearn*, 63 N. H. 99; *Wise v. Fuller*, 2 Stew. Eq. 257).

³⁴ *Rubens v. Mead*, 53 Pac. Rep. 432 (Cal. 1898).

is incumbent upon the purchaser to show affirmatively that no deception was practiced; and when it appears that he not only concealed the offer he had received, but advised his vendee not to see the other owners and represented to them that he took great risks in buying the property, he is guilty of false representation, and the sale should be rescinded."

CHAPTER XXX.

WHAT CONSTITUTES FRAUD. ACTS USUALLY CONSIDERED FRAUDULENT.

§ 292. General Statement.

Fraud may be based on representations that others have offered a certain price for the property, or that a certain price was paid for the property,¹ or that the property brings a certain rental, or as to improvements on the property, or as to its situation, or with respect to the maturity of the mortgages thereon, or even with respect to the vendor's title. (§§ 293-300.)

§ 293. Representation That Certain Price Had Been Offered.

“A false representation that a person had offered to purchase the property from the owner for a fixed price, when in fact the only offer made was an offer for a very much smaller price, is actionable if a person thereby is induced to buy the property, anticipating that he may sell to the person who made the first offer, and supposing the amount stated to have been true. Such a statement is not one as to the value of property, but is the statement of a fact, namely, the offer made by the first person, which is peculiarly within the owner's knowledge.”²

¹ As to this the authorities are conflicting.

² *Isman v. Loring*, 130 App. Div. 849 (N. Y. 1909); 20 Cyc. 59.

§ 294. Representation as to Value and Price Paid for Property.

It has been held that a false statement by a vendor to a vendee concerning the value "of property about to be sold, will not sustain an action for fraud, but the vendee in such cases must rely on his own judgment. It may be that the rule in such cases would be different if the purchaser was prevented by any act or artifice of the seller from exercising his judgment in ascertaining the value."³

Where the question was not one arising out of a representation as to value but was with respect to a fact which might, in the ordinary course of business, influence the action and control the judgment of the purchaser, namely, the price paid for the property by the vendor within less than a month prior to the sale, it was held "that a false statement with respect to the price paid under such circumstances, which is intended to influence the purchaser, and does influence him, constitutes a sufficient basis for a finding of fraud."⁴ While the vendor may not be bound to speak on the subject, if he does, he should speak the truth.⁵

But the authorities on this subject are in conflict.⁶ Thus in *Bosley v. Monahan*, 112 N. W. 1102 (Iowa 1907) it was said: "There seems to be a difference of opinion * * * among the courts, as to whether a statement as to the price paid by the seller or the price which has been offered to the seller is a material statement of fact on which the buyer may rely, or, like a general statement of value, to be treated only as trade talk. This court has taken the view that such statements may be relied on as material representations of fact."⁷

³ *Ellis v. Andrews*, 56 N. Y. 83 (1874).

⁴ *Fairchild v. McMahon*, 139 N. Y. 290, 293, 294 (1893).

⁵ *Id.*

⁶ 20 Cyc. 54.

⁷ Citing *Teachout v. Van Hoesen*, 76 Iowa 113; 40 N. W. 96; 1 L. R. A. 664; 14 Am. St. Rep. 206; *Dorr v. Cory*, 108 Iowa 725; 78 N. W. 682; *Scott v. Burnight*, 131 Iowa 507; 107 N. W. 422.

§ 295. Representations as to Rentals.

Fraud may be based on false statements of rental.⁸ Misrepresentations as to rental of the property made by the broker is a sufficient basis for rescission of the contract.⁹ "The statement by a vendor that the income from a property is greater than it in fact is, is a fraud for which an action will lie."¹⁰ The purchaser need make no effort to ascertain from the tenants the actual rent, where the vendor diverts him from inquiry, as the vendee has a right to rely upon the mere statement of the vendor or his broker. Want of diligence in discovering the fraud is not sufficient to deprive a party of his right to rescind a fraudulent contract.¹¹ But statements made by brokers not employed by the vendor, will not support a rescission, as where the brokers really represent the purchaser but the seller voluntarily pays the commission.¹²

In *Goodman v. Hess*, 56 Misc. 482 (N. Y. 1907), a discrepancy of \$264 in the statement of the annual rentals was held material, the vendor having stated them to be \$5,325 per annum. This was a case in which the proposed purchaser refused to enter into a contract on account of such misrepresentation and the broker was held entitled to commissions. Where a purchaser is induced to take title by a false representation as to the rents, "the measure of damages is the difference between the market value of the premises if they had been as represented and their actual market value."¹³

⁸ *Kreshover v. Berger*, 135 App. Div. 27 (N. Y. 1909); *Remmers v. Berbling*, 66 Misc. 291 (N. Y. 1910); *Hecht v. Metzler*, 48 Pac. 40 (Utah 1897), (citing *DeFrees v. Carr*, 8 Utah 488; 33 Pac. 217; *Griffing v. Diller*, 21 N. Y. Supp. 407; *Wise v. Fuller*, 29 N. J. Eq. 257; *Speed v. Hollingsworth*, 38 Pac. (Kans.) 497).

⁹ *Forster v. Wilhusen*, 14 Misc. 520 (N. Y. 1895).

¹⁰ *Conlan v. Roemer*, 52 N. J. L. 56 (1889), (citing *Wise v. Fuller*, 2 Stew. Eq. 257; *Dimmock v. Hallett*, L. R. 2 Ch. App. 21).

¹¹ *Forster v. Wilhusen*, 14 Misc. 520 (N. Y. 1895). See also *Prince v. Jacobs*, 80 App. Div. 243 (N. Y. 1903).

¹² *Rothstein v. Isaac*, 124 App. Div. 133 (N. Y. 1908).

¹³ *Ettlinger v. Weil*, 184 N. Y. 182 (1906); further appeal, 131 App. Div. 784 (N. Y. 1909).

§ 296. Representations as to Improvements.

Where it was claimed that the vendor represented that the property had gas and water, and the party charged with making the representations claimed that he only made a qualified representation, "that Babylon had water, gas and all facilities and that this property was within Babylon," it was held that the representation, while literally it might be true, was, as it carried with it a suggestion of falsehood when taken in connection with other facts, made to convey a fraudulent purpose.¹⁴

§ 297. Representations as to Situation of Property.

A representation that lots are situated five to ten minutes' walk from railroad station, when in fact they are a mile and a half or two miles therefrom, is a false representation.¹⁵ Where wrong land is pointed out, recovery may be had;¹⁶ and also where the boundaries are misrepresented.¹⁷

§ 298. Representations as to Mortgages on Property.

A representation by the vendor that a mortgage on the property could remain as long as interest was paid, was held sufficient to avoid a contract where the mortgagee had made no such arrangement.¹⁸ In this case¹⁹ the authorities were reviewed as to the right of a vendee to recover a deposit made on an oral contract for the sale of property, entered into on a representation that a mortgage then on the property could remain as long as interest was paid. The mortgagee had in fact made no such arrangement, and it was held that the vendee could rescind and recover his deposit on account of the fraud.

¹⁴ *Scarsdale Pub. Co. v. Carter*, 63 Misc. 276 (N. Y. 1909). See also *Hansen v. Kline*, 113 N. W. 504 (Iowa 1907).

¹⁵ *Id.*

¹⁶ *Stelting v. Bank of Sparta*, 136 Wisc. 369 (1908).

¹⁷ *Davis v. Nuzum*, 1 L. R. A. 774 (Wisc. 1888).

¹⁸ *Hellman v. Strauss*, 2 Hilt. 9 (N. Y. 1858).

¹⁹ *Id.*

§ 299. Representation that Others Want the Property.

In *Hammond v. Pennock*, 61 N. Y. 145, 151 (1874), one of the features of the fraud was the overworked assertion that somebody else wanted the property and if the buyer intended to buy he had better make up his mind at once. There were, however, other material misrepresentations.

§ 300. Representations as to Title of Vendor.

There may be fraud, too, in respect to the title of the vendor,²⁰ as for instance where the vendor induced the purchaser to take a deed on the representation that he owned the property and had a good title, when in fact he had but tax sale certificates.²¹ "Proof of mere misrepresentation as to ownership may demand rescission of a contract, but will not sustain an action for deceit, in the absence of allegation, sufficient evidence and finding of intent to deceive."²²

²⁰ *Kerwin v. Friedman*, 127 Mo. App. 522 (1907); *Meeks v. Garner*, 11 L. R. A. 196 (Ala. 1890).

²¹ *Grosjean v. Galloway*, 64 App. Div. 547 (N. Y. 1901); and see *Maupin on Marketable Titles* (2nd Ed.), pp. 236 *et seq.*

²² *Zagarino v. Kurzrok*, 135 App. Div. 764 (N. Y. 1909), (citing *Wakeman v. Dalley*, 51 N. Y. 27; *McIntyre v. Buell*, 132 N. Y. 192).

CHAPTER XXXI.

NEGLIGENCE ON PART OF VENDEE.

§ 301. General Statement.

The authorities are not entirely harmonious as to how far a vendee may rely upon the representations of the vendor. In some jurisdictions it is held that representations to be relied upon must be such as an ordinarily prudent man would rely upon. In other words, the vendee must exercise ordinary care. In other jurisdictions it is held that negligence on the part of the vendee is no bar to relief in case of fraud. Most authorities are in accord that the exercise of prudence and caution is excused (1) where confidential relations exist between the parties, and (2) where fraud or artifice is used to divert or prevent inquiry or investigation, or to mislead. (§§ 302-307.)

§ 302. May Vendee Rely Upon Statement of Vendor?

As to whether a person may rely absolutely upon representations made, or is bound to make independent investigation, the authorities are not altogether clear and harmonious. In *Mead v. Bunn*, 32 N. Y. 279 (1865), it is said that it is a mistake to assume "that a false representation by one of the parties to a contract puts the other on inquiry as to its truth. Every contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party and unknown to him, as the basis of a mutual engagement; and he is under no obligation to investigate

and verify statements, to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith.”¹ In *Forster v. Wilhusen*, 14 Misc. 520 (N. Y. 1895), it was held that where by his agent an owner, with intent to deceive the purchaser, made representations as to the rentals of the property, and those representations were untrue and material in inducing the purchaser to purchase, and where with due diligence, after discovery of the fraud, the purchaser demanded a rescission of the contract and the return of the money paid upon it, the facts sufficed to support an action. It is no answer that the purchaser made no effort to ascertain from tenants the actual rent, where the owner diverted the purchaser from such inquiry. In fact, the purchaser has a right to rely on the mere statement of the broker, and want of diligence in discovering the fraud is not sufficient to deprive a party of his right to rescind a fraudulent contract. Moreover, a mistake or innocent misrepresentation, if material, is enough for rescission of the contract.

In an action brought to recover damages for false representations alleged to have been made in respect to liens and encumbrances upon the property sold, the court said that the fact that the plaintiff could have informed himself as to encumbrances by an examination of the public records does not preclude him from maintaining his action. “Negligence is no defense to fraud. That the victim was an easy mark has not yet been heard to justify garroting.”²

§ 303. Vendor Not Ordinarily Required to Volunteer Information.

On the other hand it is said that “the general rule is, that a party engaged in a business transaction with an-

¹ And see *Townsend v. Felthousen*, 156 N. Y. 624, 625 (1898).

² *Blumenfeld v. Stine*, 42 Misc. 413 (N. Y. 1904).

other can commit a legal fraud only by fraudulent misrepresentations of facts, or by such conduct or such artifice for a fraudulent purpose as will mislead the other party or throw him off from his guard, and thus cause him to omit inquiry or examination which he would otherwise make. A party buying or selling property, or executing instruments, must by inquiry or examination gain all the knowledge he desires. He cannot proceed blindly, omitting all inquiry and examination, and then complain that the other party did not volunteer all the information he had. Such is the general rule. But there are exceptions to this rule. Where there is such a relation of trust and confidence between the parties, that the one is under some legal or equitable obligation to give full information to the other party—information which the other party has a right, not merely *in foro conscientie*, but *juris et de jure*, to have, then the withholding of such information purposely may be a fraud.³ It is not always easy to define when this relation of trust and confidence exists; and no general rule can be formulated by which its existence can be known.”⁴

§ 304. Vendee Required to Exercise Caution.

Again, it is said, “Prudence and caution must be exercised. The representations must be such that an ordinarily prudent man would rely on as true, to justify a person in relying upon them.”⁵ In the same case, it was said: “An instruction which told the jury that if, by an ordinary degree of precaution, the plaintiff could have ascertained the falsity of the representations complained of, then the plaintiff was not entitled to recover, was

³ Citing Story's Eq. Jur., §§ 207 *et seq.*; Hadley v. Clinton County Importing Co., 13 Ohio St. R. 502; Bench v. Sheldon, 14 Barb. 66; Paul v. Hadley, 23 Barb. 521.

⁴ Dambmann v. Schulting, 75 N. Y. 61, 62 (1878). See also Denning v. Darling, 2 L. R. A. 743 (Mass. 1889), and note.

⁵ Press v. Hair, 133 Ill. App. 534 (1907), (citing Grier v. Puterbaugh, 108 Ill. 602; Hutchinson v. Lyford, 123 Ill. 300; Eames v. Morgan, 37 Ill. 260; Dickinson v. Atkins, 100 Ill. App. 401).

held a correct statement of the law in *Eames v. Morgan*, 37 Ill. 260." In another case,⁶ it was said: "The general rule is that a purchaser must exercise common prudence, and if he fails to avail himself of the ordinary means of information the law gives him no redress.⁷ But defendants cannot invoke this rule, because of their active efforts to conceal the condition of the mine, to thwart investigation and inquiry, and in misrepresenting the significance of conditions that were apparent. Such conduct brings the case within the salutary exception designed to avoid encouragement to fraudulent and deceitful practices."⁸ In *Ripy v. Cronan*, 115 S. W. 794 (Ky. 1909), the court, after quoting from 20 Cyc. 49, that the rule of *caveat emptor* applies, states that the exceptions to the rule of *caveat emptor* are: "First, where confidential relations exist between the two; and, second, where fraud or artifice is used to prevent inquiry or investigation."

§ 305. Degree of Caution Required of Vendee.

In *Long v. Warren*, 68 N. Y. 426 (1876), the representations alleged to be false were as to the non-existence on the farm of a noxious weed known as quack grass, which rendered the farm less valuable. The defendant used no artifice either of word or act to dissuade or turn away or hinder the plaintiff from making inspection of the farm for himself. The plaintiff had passed over the farm, and had he taken ordinary pains to look out for this grass, he would have perceived it. "Where the matter is not peculiarly within the knowledge of the defendant," says the court, "and the plaintiff has

⁶ *Tooker v. Alston*, 159 Fed. 603 (1907).

⁷ *Citing Andrus v. St. Louis Smelting Co.*, 130 U. S. 643; 9 Sup. Ct. 645; 32 L. Ed. 1054.

⁸ *Citing Strand v. Griffith*, 38 C. C. A. 444; 97 Fed. 854; *Henderson v. Henshall*, 4 C. C. A. 357; 54 Fed. 320. See also *Stewart v. Wyoming Ranch Co.*, 128 U. S. 383; 9 Sup. Ct. 101; 32 L. Ed. 439.

the means of obtaining correct information, apart from the statement made to him, he may not recover upon the false declaration.⁹ To the same effect is *Starr v. Bennett*, 5 Hill, 303. The representations must be such that the vendee has no means of discovering their falsity. If he does not avail himself of the means of knowledge within his reach, he will not be entitled to the aid of a court of equity.¹⁰ It is stated in *Smith v. Countryman*, 30 N. Y. 681, though obiter perhaps, that statements as to value of property, and the freedom of it from defects which are known, to the one making them, to exist, but which might by the exercise of reasonable diligence be discovered, do not, if false, vitiate the contract. In *Vernon v. Keyes*, 12 East, 632, affirmed 4 Taunton, 488, it is held that a seller is unquestionably liable to an action of deceit, if he fraudulently misrepresent the quality of the thing sold, to be other than it is, in some particulars, which the buyer has not equal means with himself of knowing.¹¹ At *nisi prius*, a limitation to the rule was announced as follows: Means unused, of detecting the falsity of representations, are not a bar to an action, but matter for the jury, and if the jury find for the plaintiff, will not be ground for a reversal.¹² But we are not now reviewing the verdict of a jury for the plaintiff, but are dealing with the facts as a general proposition as if we sat in the place of a jury, and are not called upon to sanction or disapprove that holding at *nisi prius*. It is also said in one case, that the very fact of a warranty having been given, would tend to throw the warrantee off his guard, and prevent him from making a close examination.¹³ But that is where he has taken a covenant, and may rely upon it."

⁹ Citing *Bayley v. Merrel*, Cro. Jac. 386.

¹⁰ Citing *Tallman v. Green*, 3 Sandf. 437.

¹¹ Referring to 1 Kent, 484, 485; *Sherwood v. Salmon*, 5 Day 439, 449.

¹² Citing *Bowing v. Stevens*, 2 Carr & P. 337.

¹³ Citing *Holyday v. Morgan*, 28 Law J. Q. B. 9.

§ 306. **Vendee Must Exercise Ordinary Caution.**

“ In the kindred cases of false pretences, the criminal law holds to the rule we have above given, and it has been resolved, that where an exercise of common prudence and caution on the part of the prosecutor, would have enabled him to avoid being imposed upon by the pretence alleged, there can be no conviction.¹⁴ The rule is summed up in Addison on Torts: When the real quality of the thing spoken of is an object obvious to ordinary intelligence, and the parties making and receiving the representations have equal knowledge, or equal means of acquiring information, and the truth or falsity of them may be ascertained by the party interested in knowing, by the exercise of ordinary inquiry and diligence, and they are not made for the purpose of throwing him off his guard, and directing him from making the inquiry and examination, which every prudent person ought to make, there is no warranty of the truth of the representations, or that they are as they are stated to be, and there are no false and fraudulent warranties, within the legal definition of that phrase, upon which an action can be maintained. The rule is comprehensively stated as follows, by the United States Supreme Court in *Slaughter’s Administrators v. Gerson*, 13 Wall. 383: ‘ They must be representations relating to a matter as to which the complaining party did not have at hand the means of knowledge. Where means of knowledge are at hand and equally available to both parties, and the subject of the purchase is equally open to their inspection, if the purchaser does not avail himself of those means and opportunities, he will not be heard to say in impeachment of the contract of sale that he was drawn into it by the vendor’s misrepresentations.’ (See also *Davis v. Sims*, *Lalor’s Hill and Denio*, 234; *S. In. Co. v. Adam*,

¹⁴ Citing *People v. Williams*, 4 Hill 9.

23 Pick, 256; *Mooney v. Miller*, 102 Mass. 220.) Some of the cases cited were of sales of land.”¹⁵

§ 307. Negligence No Bar to Relief in Cases of Wilful Fraud.

“ The principles laid down in *Long v. Warren*, and the cases upon which it rests, have never been applied in this state (New York) to a case where it is simply sought to make an instrument, which by mistake or fraud fails to express the prior agreement between the parties, conform to such agreement. The authority of that case should not be extended to cases not clearly within the principles there laid down. It is certainly not just that one who has perpetrated a fraud should be permitted to say to the party defrauded when he demands relief that he ought not to have believed or trusted him. Where one sues another for negligence his own negligence contributing to the injury will constitute a defense to the action; but where one sues another for a positive, wilful wrong or fraud, negligence by which the party injured exposed himself to the wrong or fraud will not bar relief. If the rule were otherwise, the unwary and confiding, who need the protection of the law the most, would be left a prey to the fraudulent and artful practices of evil-doers.”¹⁶

Where there is no fraud or circumvention, some authorities hold that it is not for the courts to relieve a party from the mere results of his own carelessness, negligence or laches, not induced by the conduct of the other party. “ But if a party is led to forbear inquiry by false representations as to matters material and not collateral, intentionally made with knowledge of their falsity for the purpose of inducing such forbearance, or by fraudu-

¹⁵ *Long v. Warren*, 68 N. Y. 426 (1876). See also *Brauckman v. Leighton*, 60 Mo. App. 43 (1894).

¹⁶ *Albany City Savings Inst. v. Burdick*, 87 N. Y. 49 (1882); *Judd v. Walker*, 114 S. W. 979 (Mo. 1908); *Banking Co. v. Cunningham*, 103 Me. 466 (1908), (citing *Livingston v. Strong*, 107 Ill. 295); *U. S. Gypsum Co. v. Shields*, 106 S. W. 724 (Tex. 1908); *Och v. M. K. & T. Ry. Co.*, 130 Mo. 71, 72 (1895).

lent artifice or deceitful maneuvers resorted to with the like knowledge and purpose, upon which he in fact relies, the question of whether a careful and prudent man would have been misled in like circumstances is immaterial."¹⁷

The rule that negligence of the party defrauded in failing to read a paper which he signed precludes him from attacking its validity, does not prevail in this state (New York) though, as was said in *Wilcox v. American Tel. Co.*, 176 N. Y. 117 (1903), there may be dicta in the text books and decisions in other jurisdictions to that effect.¹⁸ It was expressly repudiated by the New York Court of Appeals in *Albany City Savings Institution v. Burdick*, 87 N. Y. 40.¹⁹ The duty of self-protection is also discussed in *Smith v. Countryman*, 30 N. Y. 655 (1864).

¹⁷ *Crompton v. Beedle*, 75 Atl. 336 (Vt. 1910).

¹⁸ And see *Rollins v. Quimby*, 200 Mass. 162 (1908).

¹⁹ See also *Welles v. Yates*, 44 N. Y. 525 (1871); *Smith v. Smith*, 134 N. Y. 62 (1892).

CHAPTER XXXII.

WAIVER. RESCISSION. REMEDIES.

§ 308. General Statement.

The right of rescission on account of fraud may be waived by recognizing the contract as binding, after knowledge of the fraud. (§§ 309-312.)

A person who has been induced by fraudulent representations to buy property has three remedies to elect from: (1) He may rescind the contract absolutely, restore or offer to restore the property, and sue at law to recover the consideration parted with; (2) he may bring suit to rescind; and (3) he may retain what he has received, and sue at law for damages. (§§ 313-320.)

Rescission, if resorted to, must be prompt. (§§ 310, 316.)

§ 309. Waiver of the Fraud.

The right to rescind a contract secured by fraud may be waived, if a party with knowledge that a fraud has been perpetrated upon him, confirms the transaction by making new agreements or engagements respecting it, or retains and uses the subject of it after knowledge, or otherwise recognizes it as binding.¹ The court in *Pryor v. Foster*, 130 N. Y. 175, 176 (1892) quotes from *Bigelow on Fraud*, 184, as follows: "If a party with knowledge that a fraud has been perpetrated upon him in a parti-

¹ *Pryor v. Foster*, 130 N. Y. 175, 176 (1892); *Schiffer v. Dietz*, 83 N. Y. 307, 308 (1880); *Remmers v. Berbling*, 66 Misc. 291 (N. Y. 1910); *State Bank v. Brown*, 119 N. W. 81 (Iowa 1909); *Schmidt v. Mesneer*, 48 Pac. 54 (Cal. 1897), (citing *Doherty v. Bell*, 55 Ind. 205; *St. John v. Hendrickson*, 81 Ind. 350; *Negley v. Lindsay*, 67 Penn. St. 217; *Nomnan v. Land Co.*, 81 Cal. 1).

cular transaction, confirmed the transaction by making new agreements or engagements respecting it, or by retaining and using the subject of it after knowledge, or otherwise recognize it as binding, he thereby waives the right to treat it as invalid and abandons his right to rescind if it be a case of contract, or to redress if it be a tort not attended with a contract with the wrongdoer. If, however, the fraud result in a contract, performance of the same after discovering that it was fraudulently obtained by the opposite party does not preclude a person from suing for damages on account of the fraud. The injured party may retain the benefits of the contract, confirm its validity, and still recover damages for the fraud by which he was induced to make it; or he may recoup any damages which he has sustained if the opposite party sue him for money due on the contract or other failure to perform it.”²

§ 310. What Constitutes Waiver of Fraud.

Where any benefit is received under the contract, after knowledge of the fraud, it is a ratification and affirmance of the contract.³ The right to rescind a contract for fraud must be exercised immediately⁴ upon its discovery, and any delay in doing so, or the continued employment, use and occupation of the property received under the contract, will be deemed an election to affirm it.⁵ Continuance in possession after discovery of the fraud is evidence of an intent to abide by the contract.⁶

But the mere bringing of an action on a contract, unless brought with knowledge of the fraud which induced the contract, is not a binding election to ratify the contract nor a waiver of the right to rescind the contract

² *Modlin v. Railroad*, 145 N. C. 223 (1907).

³ *Cobb v. Hatfield*, 46 N. Y. 536 (1871).

⁴ See § 316 *infra*.

⁵ *Strong v. Strong*, 102 N. Y. 73 (1886). See also *Pryor v. Foster*, 130 N. Y. 175 (1892).

⁶ *Schliffer v. Dietz*, 83 N. Y. 308 (1880).

for the fraud.⁷ But by suing on the contract after knowledge of the fraud, the right to disaffirm on account of the fraud is waived.⁸ The fact that a deed of the premises was executed and delivered subsequent to the fraud, is no defense unless the deed was received and accepted with notice of the fraud.⁹

§ 311. Full Knowledge of Fraud Not Necessary to Waiver.

It is not necessary, in order to make the election conclusive, that the party electing shall be acquainted with all the evidence which may tend to prove the fraud. It is sufficient if he has knowledge of all the material facts showing the actual perpetration of fraud upon him.¹⁰ And it has been said that the question of waiver is largely one of intent.¹¹ But the doctrine that any act in affirmance of a contract after discovery of fraud, defeats the right of rescission, is not necessarily applicable to an action for damages founded in fraud.¹²

§ 312. Recitals in Contract Do Not Operate as Waiver of Fraud.

A purchaser is not estopped from rescinding a contract of sale for fraud, by a recital therein that no representations have been made for the purpose of inducing the sale.¹³ A clause which provides that "no verbal agreements affecting the validity of this contract will be recognized," does not obviate the results of fraud, for

⁷ Equitable Co-operative Foundry Co. v. Hersee, 103 N. Y. 25 (1886).

⁸ Conrow v. Little, 115 N. Y. 387 (1889); Robb v. Vos, 155 U. S. 16 (1894); Crook v. First Nat. Bk., 83 Wisc. 31 (1892). And see Johnson Co. v. Mo. Pac. Ry. Co., 126 Mo. 344.

⁹ Blumenfeld v. Stine, 42 Misc. 413 (N. Y. 1904).

¹⁰ Bach v. Tuch, 126 N. Y. 53 (1891); El. Bement & Sons v. La Dow, 66 Fed. Rep. 195 (1895).

¹¹ Pryor v. Foster, 130 N. Y. 177 (1892).

¹² N. Y. Land Imp. v. Chapman, 118 N. Y. 295 (1889); Pryor v. Foster, 130 N. Y. 171 (1892).

¹³ Bridger v. Goldsmith, 143 N. Y. 424 (1894).

fraud is not an *agreement*. It is an imposture practiced by one upon another. It may be used as an inducement to enter into an agreement.¹⁴ Where a tenant sues for damages sustained by reason of the false representations of the landlord, an agreement that the landlord should not be liable for any damages caused by or arising from any source whatsoever in or about the premises, is not a waiver of damages caused to the tenant by the fraud of the landlord.¹⁵

§ 313. Remedies for Fraud. Measure of Damage.

“ It is elementary that a person who has been induced by fraudulent representations to become the purchaser of property has, upon the discovery of the fraud, three remedies open to him, either of which he may elect: First, he may rescind the contract absolutely, and sue to recover the consideration, in which case he must first restore or offer to restore the property; second, he may bring action to rescind; third, he may retain what he has received, and bring an action at law to recover the damages sustained,¹⁶ in which case the measure of his recovery is the difference between the value of the article sold and what it should be according to the representations.¹⁷ In *Krumm v. Beach*, 96 N. Y. 398 (1884), it was held that where a party seeks the third remedy, whether the representations relate to the title or to matters collateral to the land, the measure of the damages is full indemnity to the injured party,—the entire amount of his loss occasioned by the fraud.”¹⁸

¹⁴ *Scarsdale Pub. Co. v. Carter*, 63 Misc. 275 (N. Y. 1909); *U. S. Gypsum Co. v. Shields*, 106 S. W. 724 (Tex. 1908).

¹⁵ *Blumenfeld v. Wagner*, 63 Misc. 69 (N. Y. 1909).

¹⁶ *Judd v. Walker*, 114 S. W. 979 (Mo. 1908); *Modlin v. Railroad*, 145 N. C. 223 (1907); *Minazek v. Libera*, 83 Minn. 288 (1901); *St. John v. Hendrickson*, 81 Ind. 350 (1882).

¹⁷ Citing *Vail v. Reynolds*, 118 N. Y. 297 (1889).

¹⁸ *Grosjean v. Galloway*, 64 App. Div. 547 (N. Y. 1901). As to proof of fraud at law and in equity, see § 320 *infra*.

§ 314. Remedies for Fraud. Action to Rescind.

"A person who has been induced by fraudulent representations to become the purchaser of property has upon discovery of the fraud three remedies open to him, either of which he may elect. He may rescind the contract absolutely and sue in an action at law to recover the consideration parted with upon the fraudulent contract. * * * He may bring an action in equity to rescind the contract and in that action have full relief.¹⁹ Such an action is not founded upon a rescission, but is maintained *for* a rescission,²⁰ and it is sufficient, therefore, for the plaintiff to offer in his complaint to return what he has received and make a tender of it on the trial. Lastly, he may retain what he has received and bring an action at law to recover the damages sustained."²¹

It may be observed that in the case just quoted from,²² the court said that "no question was raised by answer or during the trial as to the jurisdiction of the court and neither party demanded a trial by jury. Both parties tried the case on the theory that if the facts alleged in the complaint were established the plaintiff would be entitled to equitable relief of some kind," but we fail to see how any objection as to the jurisdiction of a court of equity could prevail where the action is brought for the relief secondly above mentioned.

§ 315. Liability on Contract in Case of Fraud.

"Whatever facts would enable a party to avoid a contract, are equally available to enable him to defeat one sought to be enforced against him."²³ "If a vendee of land who was induced to purchase by means of false rep-

¹⁹ Citing *Allerton v. Allerton*, 50 N. Y. 670.

²⁰ See § 316 *infra*.

²¹ *Davis v. Rosenzweig Realty Co.*, 192 N. Y. 128 (1908), quoting from *Vall v. Reynolds*, 118 N. Y. 297. See also *Prince v. Jacobs*, 80 App. Div. 243 (N. Y. 1903).

²² *Davis v. Rosenzweig Realty Co.*, 192 N. Y. 132 (1908).

²³ *Smith v. Countryman*, 30 N. Y. 670 (1864); *Pryor v. Foster*, 130 N. Y. 176 (1892); *Johnson v. Sheridan Lumber Co.*, 93 Pac. 473 (Ore. 1908).

resentations, does not rescind, and offer to reconvey, he may only sue for damages for the fraud, or plead a counterclaim for such damages in an action against him for the purchase price. He cannot exonerate himself from liability for the purchase price, except by rescinding and offering to reconvey on discovering the fraud. *Krumm v. Beach*, 96 N. Y. 398 (1884).''²⁴

§ 316. Rescission.

A party who would rescind a contract upon the ground of fraud, must act promptly,²⁵ and restore or offer to restore to the other party what he received under it.²⁶ But delay in rescinding may be explained, and ordinarily a person cannot be charged with delay in rescinding until after he has discovered the fraud. The vendee's rescission of the contract for the fraud of the vendor, dissolves it *ab initio*.²⁷ "The election to rescind a contract for fraud evidenced by the bringing of an action based thereon is irrevocable and prevents the bringing of an action on the contract itself, and vice versa, when the plaintiff has knowledge of the fraud."''²⁸

"Rescission has to be made in advance of an action to recover back money paid on a fraudulent contract of purchase, but not to bring a suit for a rescission. Such a suit is not based on a previous rescission; it is for a rescission, and it suffices that the complaint itself is a rescission by necessary offers to tender, to restore, etc."²⁹ The distinction between an action based on a rescission and one for a rescission seems to be obscured or lost sight of by the language of some opinions."''³⁰

²⁴ *Soper v. St. Regis Paper Co.*, 38 Misc. 294 (N. Y. 1902); *aff'd*, 76 App. Div. 409 (N. Y. 1902).

²⁵ *Mestier v. Jeffries*, 145 Mich. 603 (1906). See also § 310 *supra*.

²⁶ *Hammond v. Pennock*, 61 N. Y. 152, 153 (1874).

²⁷ *Whalen v. Stuart*, 194 N. Y. 503 (1909).

²⁸ *Realty Transfer Co. v. Cohn Co.*, 132 App. Div. 286 (N. Y. 1909).

²⁹ *Citting Vail v. Reynolds*, 118 N. Y. 297; *Berry v. A. C. Ins. Co.*, 132 N. Y. 49.

³⁰ *McGowan v. Blake*, 134 App. Div. 165, 166 (N. Y. 1909).

§ 317. Offer to Restore.

While generally the defrauded party must, before he can maintain an action, either return or offer to return what he has received under a contract before he may rescind it for fraud,³¹ there is an exception to this rule where the defrauded party is entitled, in any event, to all that he has received. In such a case a return or offer to return is not a condition precedent to the bringing of an action. It is sufficient if the sum retained is taken into account and allowed in the judgment.³² "In an action in equity, brought for the rescission of a contract, it is sufficient if the plaintiff offer in his complaint to return what he has received, and make a tender of it on the trial."³³

§ 318. Pleading Fraud.

"The burden of charging as well as proving fraud is on the party alleging it, and facts constituting the alleged fraud must set forth in order to entitle a party to introduce evidence of it. Mere conclusions of law are not enough."³⁴ "To sustain a cause of action to recover damages for fraud, the plaintiff must allege the fraud and resulting damage, but when fraud and damage are both alleged there is a cause of action."³⁵ "Fraud gives a cause of action for the damages which necessarily result from the wrong, and these may be recovered without an averment of special damage. Such damages, however, as are the material but not the necessary result of the injury, are special and must be alleged."³⁶

§ 319. Pleading Fraud Committed by More than One.

The principles which govern an action for fraud and

³¹ *Noyes v. Patrick*, 58 N. H. 618 (1879).

³² *Douglass v. Scott*, 130 App. Div. 322 (N. Y. 1909); *Bebout v. Bodle*, 38 Ohio St. 500 (1882).

³³ *Cox v. Stillman*, 132 App. Div. 437 (N. Y. 1909). As to the various remedies at law and in equity, see §§ 313-316 *supra*.

³⁴ *Eppley v. Kennedy*, 131 App. Div. 4 (N. Y. 1909).

³⁵ *Isman v. Loring*, 130 App. Div. 847 (N. Y. 1909).

³⁶ *Id.*, 848.

deceit are the same whether the fraud is alleged to have originated in a conspiracy, or to have been solely committed by a defendant without aid or coöperation.

Whenever it becomes necessary to prove a conspiracy in order to connect the defendant with the fraud, no averment of the conspiracy need be made in the pleadings to entitle it to be proved.³⁷ An allegation of conspiracy need not be proved but may be wholly disregarded if plaintiff can show otherwise the guilty participation of any defendant.³⁸

Where a conspiracy is established, the acts, admissions and declarations of any one of the conspirators, done and made during the criminal enterprise, in pursuance and furtherance thereof and in reference thereto may be proved.³⁹ "Such evidence is received on the theory that the conspirators have jointly assumed to themselves as a body, the attributes of individuality, so far as regards the common design, thus rendering whatever is done or said by any one in furtherance of that design, a part of the *res gestæ*, and therefore the act of all."⁴⁰

§ 320. Proof of Fraud at Law and in Equity.

The question may arise as to whether the fraud requisite as a basis for rescinding a contract in equity is of the same nature as that demanded in a court of law in an action for damages for deceit. "In equity, the right to relief is derived from the suppression or misrepresentation of a material fact, though there be no intent to defraud. This view has been applied to innocent misrepresentations in a prospectus, providing that they were of the

³⁷ *Butler v. Duke*, 39 Misc. 243 (N. Y. 1902).

³⁸ *Brackett v. Griswold*, 112 N. Y. 466, 467 (1889); and see *Hansen v. Kline*, 113 N. W. 508 (Iowa 1907).

³⁹ On the general subject of conspiracy, see *Place v. Minster*, 65 N. Y. 95 (1875).

⁴⁰ *N. Y. Guar. & Ind. Co. v. Gleason*, 78 N. Y. 508 (1879); *Page v. Parker*, 43 N. H. 363 (1861); *Wiggins v. Leonard*, 9 Iowa 197 (1859).

essence of the contract. This doctrine is, substantially, grounded in fraud, since the misrepresentation operates as a surprise and imposition upon the opposite party to the contract. It is inequitable and unconscientious for a party to insist on holding the benefit of a contract which he has obtained through misrepresentations, however innocently made."⁴¹

In *Jackson v. King*, 4 Cow. 220 (N. Y. 1825), it was suggested that courts of law have not, in all cases of fraud, concurrent jurisdiction with equity, and that the distinction between legal and equitable jurisdiction upon fraud is that at law it must be proved, not presumed as it may be in equity from the nature of the transaction and the situation of the parties.⁴²

⁴¹ *Hammond v. Pennock*, 61 N. Y. 152 (1874).

⁴² See also *Sculers v. Thompson*, 73 App. Div. 552 (N. Y. 1902); *Lyon v. James*, 97 App. Div. 385 (N. Y. 1904); *Bell v. James*, 128 App. Div. 241 (N. Y. 1908); *Johnson v. Sheridan Lumber Co.*, 93 Pac. 473 (Ore., 1908).

CHAPTER XXXIII.

CRIMINAL FRAUD.

§ 321. General Statement.

In New York, it is criminal to obtain a signature by false pretense or to conspire to cheat and defraud another out of property. (§§ 322-324.) Also to corrupt or to enter into unlawful agreements with agents. (§ 325.)

The New York statute is referred to in this chapter as indicative of what may be found in some other states.

§ 322. Obtaining Property by False Pretenses.

Under the New York statute, "A person who, with intent to cheat or defraud another, designedly, by color or aid of a false token or writing, or other false pretense, obtains the signature of any person to a written instrument, is punishable by imprisonment in a state prison for not more than three years, or in a county jail for not more than one year, or by a fine of not more than three times the value of the money or property affected or obtained thereby, or by both such fine and imprisonment."¹
"Where an intent to defraud constitutes a part of a crime, it is not necessary to aver or prove an intent to defraud any particular person."²

§ 323. Compelling Execution of Instrument.

The New York statute also provides that "The compelling or inducing of another, by such force or threat, to make, subscribe, seal, execute, alter or destroy any valu-

¹ N. Y. Penal Law, § 932.

² N. Y. Penal Law, § 3, subd. 5.

able security, or instrument or writing affecting or intending to affect any cause of action or defense or any property is an extortion of property within the last two sections.”³

“ § 850. Extortion Defined. Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right.

“ § 851. What Threats May Constitute Extortion. Fear, such as will constitute extortion, may be induced by a threat:

1. To do an unlawful injury to the person or property of the individual threatened, or to any relative of his or to any member of his family; or

2. To accuse him, or any relative of his or any member of his family, of any crime; or,

3. To expose, or impute to him, or any of them, any deformity or disgrace; or,

4. To expose any secret affecting him or any of them.

“ § 852. Punishment of Extortion. A person who extorts any money or other property from another, under circumstances not amounting to robbery, by means of force or a threat mentioned in the last two sections, is punishable by imprisonment not exceeding fifteen years.”⁴

§ 324. Definition and Punishment of Conspiracy.

A further provision of the New York statute is that “ if two or more persons conspire * * * to cheat and defraud another out of property, by any means which are in themselves criminal, or which, if executed, would amount to a cheat, or to obtain money or any other property by false pretenses, * * * each of them is guilty of a misdemeanor.”⁵ “ No agreement except to commit a felony

³ N. Y. Penal Law, § 853.

⁴ N. Y. Penal Law, §§ 850-852.

⁵ N. Y. Penal Law, § 580.

upon the person of another, or to commit arson or burglary, amounts to a conspiracy, unless some act beside such agreement be done to effect the object thereof, by one or more of the parties to such agreement.”⁶

§ 325. Corrupt Influencing of Agents. Unlawful Agreements of Agents.

In New York the statute also provides that “Whoever gives, offers or promises to an agent, employee or servant, any gift or gratuity whatever, without the knowledge and consent of the principal, employer or master of such agent, employee or servant, with intent to influence his action in relation to his principal’s, employer’s or master’s business; or an agent, employee or servant, who without the knowledge and consent of his principal, employer or master, requests or accepts a gift or gratuity or a promise to make a gift or to do an act beneficial to himself, under an agreement or with an understanding that he shall act in any particular manner to his principal’s, employer’s or master’s business; or an agent, employee or servant who, being authorized to procure materials, supplies or other articles either by purchase or contract for his principal, employer or master, or to employ service or labor for his principal, employer or master, receives directly or indirectly, for himself or for another, a commission, discount or bonus from the person who makes such sale or contract, or furnishes such materials, supplies or other articles, or from a person who renders such service or labor; and any person who gives or offers to such an agent, employee or servant such commission, discount or bonus shall be guilty of a misdemeanor and shall be punished by a fine of not less than ten dollars, nor more than five hundred dollars, or by such fine and by imprisonment for not more than one year.”⁷

⁶ N. Y. Penal Law, § 583.

⁷ N. Y. Penal Law, § 439.

PART V.—PROCEDURE.

CHAPTER XXXIV.

PLEADING.

§ 326. General Statement.

In suing for broker's commissions, the broker has the option either to state the facts constituting the cause of action or, if he has performed his part, according to their legal effect. (§ 329.)

If he pleads the facts constituting his cause of action, it is essential to set forth every material fact which forms a part of the cause of action. (§§ 329-333.)

If the broker alleges performance, evidence excusing performance is held by some authorities not admissible. (§ 334.)

Where the payment of commission is dependent on some special agreement, the happening of the condition precedent should be alleged. (§ 335.)

Abandonment by the broker, termination of his employment, and bad faith on the part of the broker may all be considered matters of defense. (§ 336.)

Although an act is done through an agent, it should be alleged as done by the principal, leaving the method of doing it to the proof. (§ 337.)

§ 327. Scope of Chapter.

The time and space necessarily required for a satisfactory treatment of the subject of pleading is so great that

the present chapter can but give a general idea of pleading in brokers' cases. The discussion of the subject is, as a whole, based on the so-called "reformed procedure," though here and there an authority has been drawn from a state where the common law form of pleading still exists.

The essentials of pleading are the same under most of the codes of the various states in which code pleading is the practice—with the possible exception of Louisiana. Reference will therefore be made to but a single code, and as New York was the first state to adopt the reformed procedure,¹ and its decisions have been cited so freely in other states, the law of that state has been chosen, and the citations, as a rule, are of New York decisions.

§ 328. Complaint for Broker's Commissions.

"There is only one form of civil action. The distinction between actions at law and suits in equity, and the forms of those actions and suits, have been abolished."² The New York Court of Appeals in *Sadler v. City of New York*, 185 N. Y. 414 (1906), said: "All that a plaintiff has to do in any case is to set forth in his complaint a clear, concise, and unequivocal statement of the facts constituting his cause of action, and a demand for the judgment to which he supposes himself entitled."

But let not this statement disarm the practitioner. It has the air of converting the art of pleading into a delightful pastime. Yet pleading is a technical and difficult art. The various codes were intended to simplify pleading, but, notwithstanding this, we must frequently look into the law as it existed long before the time of these enactments in order to ascertain the meaning of the codes. Often the impression is produced on the practitioner's

¹ N. Y. Const. of 1846.

² N. Y. Code Civ. Pro., § 3339.

mind that the codes have not made things so simple after all.

§ 329. Methods of Pleading.

In most cases when drawing a complaint for the recovery of a broker's commissions, either of two methods may be adopted,—the party may, at his option, state the facts constituting the cause of action as they actually existed or according to their legal effect.³

Thus a complaint⁴ alleged that the defendant was indebted to the plaintiff in the sum of \$591.18—a balance due from the defendant for work, labor and services in advertising done for and at the special instance and request of the defendant. The proof showed an agreement between the parties that plaintiff should do certain advertising for the defendant and be paid in tickets of the defendant; that plaintiff performed the work and received a certain quantity of the tickets, but not all that he should have received, the amount stated in the complaint being still due. Plaintiff demanded the balance of the tickets from the defendant but was refused. Complaint sustained.

Where there is a special agreement, and the plaintiff has performed his part, the law raises a duty on the part of the defendant to pay the price agreed upon, and the plaintiff may rely either on this implied assumpsit or on the express agreement.⁵

§ 330. Pleading Legal Effect.

From what has been said in the preceding section, it seems that the broker, having performed his part, may

³ *N. Y. News Pub. Co. v. Natl. Steamship Co.*, 148 N. Y. 39 (1895), (citing *Bennett v. Judson*, 21 N. Y. 238 (1860); *Farron v. Sherwood*, 17 N. Y. 227 (1858); *Barney v. Worthington*, 37 N. Y. 116 (1867)). See also *Hosley v. Black*, 28 N. Y. 438 (1863).

⁴ *N. Y. News Pub. Co. v. Natl. Steamship Co.*, *supra*.

⁵ *Farron v. Sherwood*, 17 N. Y. 227 (1858).

allege that the defendant is indebted to him in a stated sum for work, labor and services performed at the special instance and request of such defendant⁶ and, in New York State, at least, this regardless of whether the original agreement was for payment in money or in property of another kind. "The rule in this state seems to be that where a party agrees to pay a specific sum, * * * or the value of the services in some specific articles of property, and upon demand refuses or fails to deliver the property, his obligation is thereby converted into one for the payment of money."⁷

When the contract of employment is fully performed and nothing remains but to pay, the compensation may be recovered on the common counts.⁸ Thus a real estate broker's commission that has been fully earned under an express contract may be recovered under the common counts.⁹

In *Leimbach v. Regner*, 70 N. J. L. 608 (1904), non-suit was entered on a claim for commission, the contract of employment not being in writing as required by the New Jersey statute and the broker having sought to recover on a *quantum meruit*.¹⁰

§ 331. Pleading the Facts Constituting the Cause of Action.

If the broker prefers to plead the facts as they existed,¹¹ he may do so but must observe the formalities. "Under our Code of Civil Procedure a complaint must contain a plain and concise statement of the facts constituting each cause of action, without unnecessary repetition. § 481, subd. 2. * * * This is nothing more than a

⁶ See cases cited under preceding section; and see Form 47 *infra*, Ch. XLI.

⁷ N. Y. News Pub. Co. v. Natl. Steamship Co., 148 N. Y. 39 (1895), (citing 1 Sedg. on Damages (8th Ed.), § 280; Gleason v. Pinney, 5 Cow. (N. Y.) 152; Smith v. Smith, 2 Johns. (N. Y.) 235; Brooks v. Hubbard, 3 Conn. 58.

⁸ *Meniffee v. Higgins*, 57 Ill. 50 (1870).

⁹ *Risley v. Beaumont*, 71 N. J. L. 372 (1904).

¹⁰ See § 333 *infra* as to necessity of pleading that broker's authority to sell was in writing where statute requires writing.

¹¹ See § 329 *supra*.

restatement of the rule as it existed prior to the adoption of the present Code. While it is no longer necessary, as it was under the old system, to plead the conclusions of law which followed the facts previously stated, it is essential to set forth every material fact which forms a part of the cause of action or defense.”¹²

§ 332. Action Based Upon a Contract.

“Where an action or defense is based upon a contract, the pleading in which it is set forth should allege all the material facts.”¹³ A consideration is essential to all contracts not under seal, except so-called “contracts of record.”¹⁴ The employment of a broker creates a contract of brokerage and a consideration is essential to the validity thereof. The employer gives his promise of payment, either express or implied, upon the performance of the broker’s part of the brokerage contract.¹⁵ In other words, it is a promise for an act, which is recognized as a consideration.¹⁶

“Consideration is a material and indispensable element of every contract. ‘In declaring upon a contract not under seal, it is in all cases necessary to state that it was a contract that imports and implies consideration, as a bill of exchange or promissory note, or expressly to state the particular consideration upon which it is founded.’ ”¹⁷ “ ‘Where a consideration is not implied, or a request is essential to the defendant’s liability, it is of the gist of the action, and must be specially averred.’ ”¹⁸

¹² National Citizens’ Bk. v. Toplitz, 178 N. Y. 467, 468 (1904).

¹³ *Id.*

¹⁴ Clark on Contracts, 153.

¹⁵ See § 139 *supra*.

¹⁶ Clark on Contracts, 165.

¹⁷ National Citizens’ Bk. v. Toplitz, 178 N. Y. 467 (1904), (citing 1 Chitty on Pleadings (13th Am. Ed.), 292 and cases cited; Moak’s Van Santvoord’s Pleading, 164; Bliss on Code Pleading (2nd Ed.), § 268; Beach on Modern Law of Contracts, Vol. 2, § 1691; Bailey v. Freeman, 4 Johns. (N. Y.) 280; Dolcher v. Fry, 37 Barb. (N. Y.) 152).

¹⁸ National Citizens’ Bk. v. Toplitz, *supra*, (citing Spear v. Downing, 34 Barb. (N. Y.) 522; Gould on Pleadings, 176). As to promise to pay commissions which are

§ 333. Facts to be Stated.

Where the broker, therefore, attempts to set forth his cause of action by alleging the facts as they existed, he must state all the essential facts, which are at least these,—that the broker performed the services at the defendant's request, express or implied, or was employed by the principal,¹⁹ or where original employment is wanting, that his acts were ratified by the principal;²⁰ that he was the procuring cause of the sale, i. e., under the prevailing rule,²¹ procured a buyer, ready, willing and able²² to purchase on the employer's terms,²³ or procured an enforceable contract of sale;²⁴ and the agreed or customary amount of the commissions,²⁵ or the reasonable value of the services,²⁶ and non-payment thereof.

While it is customary to allege demand and non-payment, it is not essential to allege a demand, and, were it necessary, the bringing of the action is a sufficient demand²⁷ and the failure to make a previous demand would affect only the question of interest and probably costs.²⁸

held to be without consideration and unenforceable, see §§ 121, 205. And see §§ 208-210. The consideration must be legal. Therefore, a promise to pay commission if the broker will commit a fraud upon his employer in bringing about a deal is unenforceable. See §§ 140-145, 209 *supra*; also Clark on Contracts, pp. 441, 442.

¹⁹ See Chs. IX, X, *supra*; 8 Ency. of Pl. & Pr. 833; 19 Cyc. 274. An allegation of employment should be incorporated in the complaint, followed by sufficient averments of a compliance with the contract of employment. Yoder v. Randol, 83 Pac. 537 (Okla. 1905); 3 L. R. A. (N. S.) 576. Under an allegation that the broker was employed by a person who "was the owner of and had charge and control" of the land, the broker need not prove that such person owned the record title. Cook v. Platt, 104 S. W. 1133; 126 Mo. App. 553 (1907).

²⁰ See §§ 109-112 *supra*.

²¹ See §§ 117-119 *supra*.

²² Where the purchaser is accepted by the principal, the purchaser's financial ability is no part of the broker's affirmative case. See §§ 153-155 *supra*.

²³ The complaint should allege that the broker sold the property or that he procured a purchaser who was ready, able and willing to consummate the sale upon the specified terms. 8 Ency. of Pl. & Pr., 832.

²⁴ In some jurisdictions, it is held that the broker's obligation is performed when he produces a purchaser ready, willing and able to purchase on the principal's terms, while in other jurisdictions the broker is required to bring about an enforceable contract of sale. The conflicting views have been referred to in several preceding chapters, and principally in §§ 117-119 *supra*.

²⁵ See §§ 211-226 *supra*. That the defendant had knowledge of a custom need not be pleaded. Whitehouse v. Moore, 13 Abb. Pr. 142 (N. Y. 1861). See § 225 *supra* as to pleading rules of a board of brokers.

²⁶ See § 226 *supra*.

²⁷ Maguire v. Durant, 1 Misc. 509 (N. Y. 1892).

²⁸ De Carriearl v. Blanco, 121 N. Y. 230 (1890); Sweeny v. City of New York, 173 N. Y. 414 (1903). And see as to necessity of demand when plaintiff pleads the legal effect, § 330 *supra*.

As to alleging non-payment, it may be said that whatever may be the law, it is better practice to allege non-payment as it is a simple matter to prove *prima facie* in a broker's case. There are occasions, however, where the question may become of importance, as for instance, in an action to recover broker's commissions where one of the parties has died and the survivor is disqualified from testifying.

The law is in some confusion on the general proposition of alleging and proving payment. In an action upon contract for the payment of money only, the allegation and proof of the promise and of the fact that it has matured, creates the presumption of non-payment and throws the burden of proving payment upon the one who asserts it.²⁹

Where the statute requires the broker's authority to be in writing, some cases hold that the complaint must allege written authority.³⁰ In New Jersey, where the statute declares that no broker or real estate agent selling or exchanging land shall be entitled to commission unless his authority is in writing signed by the owner or his agent, and the rate of commission is stated,³¹ it has been held that the broker is not obliged to set out in his pleading that his authority was in writing, and that, so far as the declaration is concerned, since the right to bring an action for services in negotiating the sale of property was not created by this statute, but existed at common law, and since the statute only requires that evidence of the request and authorization must be in writing and the rate

²⁹ Conkling v. Weatherwax, 181 N. Y. 258 (1905), in which note the views of the Judges of the N. Y. Court of Appeals expressed in separate opinions and memoranda; see also the cases there cited. Other cases bearing on the point are: Lent v. N. Y. etc. R. R. Co., 130 N. Y. 504 (1892); Crawford v. Tyng, 10 Misc. 143 (N. Y. 1894); Cochran v. Reich, 91 Hun 440 (N. Y. 1895); Gruenstein v. Jablowsky, 1 App. Div. 580 (N. Y. 1896); Dry Dock R. R. Co. v. N. & E. R. R., 3 Misc. 61 (N. Y. 1893); Hauxhurst v. Ritch, 119 N. Y. 621 (1890); Edson v. Dillage, 8 How. Pr. 273 (N. Y. 1853); Fitzmahony v. Caulfield, 25 App. Div. 119 (N. Y. 1898).

³⁰ Covey v. Henry, 71 Neb. 118 (1904). See also Leimbach v. Regner, 70 N. J. L. 608 (1904).

³¹ See § 16 *supra*.

of compensation be fixed by the writing, the law would presume that the contract declared on, if required to be in writing by the statute, was in writing. In other words, that the statute introduces a new rule of evidence, and does not alter or affect the rule of pleading.³²

§ 334. Full Performance and Excuse for Performance.

Under a complaint setting out a contract and averring its performance by the plaintiff, evidence in excuse for non-performance has been held not admissible.³³

But in *Hosley v. Black*, 28 N. Y. 443 (1863), it is said, "this rule is of very little consequence; for the plaintiff may amend his complaint and then give the evidence." In a case³⁴ where the defendant made no objection to the proof, the court said that as the plaintiff did not move to amend it was in the discretion of the court, even after the close of plaintiff's case, to entertain the motion to dismiss because performance was alleged and excuse for performance was attempted to be proved.

If a waiver of performance is relied upon, it must be pleaded. A plaintiff cannot allege performance and when the same is denied change front on the trial, and establish facts excusing performance.³⁵ "Where a complaint by a broker, employed to find a purchaser or a lender, does not allege that the transaction was consummated, it must allege that plaintiff notified defendant that a customer was found."³⁶ A mere allegation that "because of the default of the defendant" the contract was not carried out, is insufficient. Facts should be stated.³⁷

³² *Adams v. Grady*, 72 Atl. 55 (N. J. 1909), (citing 1 Chitty on Pleading, marg. p. 222 and New Jersey cases). See also § 330 *supra*.

³³ *Hosley v. Black*, 28 N. Y. 443 (1863); *Stone v. Goodstein*, 49 Misc. 482 (N. Y. 1906). And see § 194 *supra*.

³⁴ *Weeks v. O'Brien*, 141 N. Y. 204 (1894).

³⁵ *Williams v. Fire Assn. of Pa.*, 119 App. Div. 573 (N. Y. 1907).

³⁶ 19 Cyc. 275.

³⁷ *Davis v. Silverman*, 98 App. Div. 305 (N. Y. 1904).

But it has been held that where the principal is unable or refuses to make the trade, the broker may sue *for commission*.³⁸ And where the cause of action was for procuring a *sale*, and the sale was prevented by the vendor, it has been held that the broker could recover as for a complete sale.³⁹

Where the owner induces the real purchaser to take title in the name of another person in order to keep the broker in ignorance of the fact that the sale had been made to the purchaser presented by the broker, the broker's complaint should not be dismissed on the ground that the evidence established a cause of action for fraud. Under such circumstances the broker may recover on an allegation of performance.⁴⁰

§ 335. Pleading Special Agreements.

Where the commission is to be paid out of the final payment received by the vendor, the broker must allege as a condition precedent that the vendor received the final payment. An allegation that the sum "became due" on a given date is not equivalent to an allegation of the happening of the condition precedent.⁴¹

Where it was agreed that the broker should have commissions if he furnished a purchaser at a fixed price, he is not entitled to compensation under the agreement for furnishing a purchaser at a less price. In such a case, the broker cannot recover proportionate commissions on the lesser sum, or what his services were reasonably worth, when he did not declare on a *quantum meruit*.⁴²

In *Morton v. Petit*, 133 App. Div. 377 (N. Y. 1909), the

³⁸ *Cadigan v. Crabtree*, 179 Mass. 481 (1901).

³⁹ *Rice-Dwyer R. E. Co. v. Ruhlman*, 68 Mo. App. 506 (1896).

⁴⁰ *Martin v. Fegan*, 95 App. Div. 154 (N. Y. 1904).

⁴¹ *Nekarda v. Presberger*, 123 App. Div. 418 (N. Y. 1908). And see §§ 228 *et seq.*, 230-234 *supra*.

⁴² *Steinfeld v. Storm*, 31 Misc. 167 (N. Y. 1900).

complaint alleged that the broker was employed "to procure * * * an acceptance of a certain application made by defendant for a loan," and that the broker "procured one * * * to accept said application." The complaint was demurred to upon the ground that there was no allegation that the broker ever communicated to or notified the defendant that he had procured a person ready, able and willing to consummate the loan, but the complaint was, nevertheless, held sufficient. In *McLaughlin v. Whiton*,³⁷ Misc. 838 (N.Y. 1902), it was held that an allegation that the broker was to *procure* a loan is not established by proving that he produced a person ready, prepared and willing to make the loan. Where the contract is to *procure* a loan, it should appear that it was actually secured; the right of action depending upon a condition precedent, performance should be averred.⁴³

§ 336. Matters of Defense.

Under a general denial a defendant may offer evidence to show that the contract actually made was another than that pleaded in the complaint. Thus, where the complaint alleges that the broker brought about an absolute sale, the principal may, under a general denial, show that the broker secured a person who took an option only.⁴⁴

Evidence of gross misconduct, fraud or negligence on the part of the broker has been held admissible where only the general issue was pleaded.⁴⁵ On the other hand, an abandonment of the employment by the broker as well as an express termination of the employment, have been held to be matters of defense and do not have to be negatived by the plaintiff in the course of his proof to support a cause of action for commission.⁴⁶ And that the broker

³⁷ *McLaughlin v. Whiton*, 37 Misc. 838 (N. Y. 1902).

⁴⁴ *Brown v. Wisner*, 51 Wash. 509; 99 Pac. 581 (1909).

⁴⁵ 8 Ency. of Pl. & Pr., 836.

⁴⁶ *Moore v. Boehm*, 45 Misc. 622 (N. Y. 1904).

did not act in good faith has also been held to be matter of defense.⁴⁷

An agent cannot be interested in the profit of a sale to his principal, and even though a person is not a party to an agreement to share the profit, he becomes liable to account under an allegation that he received and kept a share of the profit.⁴⁸

§ 337. Pleading Acts Done by Agent.

Although an act is done through an agent, it should be alleged as done by the principal, leaving the method of doing it to the proof.⁴⁹ Where false representations are made through an agent and the principal is sued, it is unnecessary to allege any agency in the making of the representations. A simple allegation that they were made by the defendant is appropriate.⁵⁰

⁴⁷ See § 141 *supra*.

⁴⁸ *Colonizers Realty Co. v. Shatzkin*, 129 App. Div. 609 (N. Y. 1909). See also §§ 142-145, 252-257 *supra*. As to whether the defendant may show, under a general denial, that the broker had agreed for commissions from both sides without the knowledge of the defendant, or whether it must be alleged as a defense, see § 58 *supra*.

⁴⁹ *Moffett v. Jaffe*, 132 App. Div. 7 (N. Y. 1909).

⁵⁰ *Harlow v. Haines*, 63 Misc. 98 (N. Y. 1909).

CHAPTER XXXV.

INTERPLEADER.

§ 338. General Statement.

When two or more brokers are employed on the same property, the circumstances may be such that both brokers claim the commission and the owner be unable to determine which of the two was the procuring cause of the sale. (§ 339.)

A bill of strict interpleader is one in which the complainant asserts his possession of something in which he claims no personal interest, but in which other persons whom he makes defendants set up conflicting claims and the complainant cannot safely determine to which he shall yield. (§ 340.)

Interpleader has been held proper where two brokers claim commission on the same sale (§ 341) but even in such circumstances the right to interplead is not universally recognized. (§ 342.)

The procedure with respect to interpleader is in most places regulated by statute. (§ 343.)

When two brokers claim the same commission and one sues in a court without jurisdiction to accord the right of interpleader, the vendor may bring an action of interpleader in another court having jurisdiction. (§ 344.)

Sufficient grounds for interpleader must be shown. (§ 345.) Interpleader makes actions at law equity suits. (§ 346.)

§ 339. Double Claims for Commission.

That the principal may employ as many different bro-

kers as he pleases to sell his property, and is liable for commissions only to that broker who is the procuring cause of the sale, has already been discussed.¹ Under such circumstances it not infrequently occurs that two different brokers claim to have been the inducing cause in the same sale and each claims the commission.

The existence of such complications is mainly due to the purchaser's efforts to secure the property on the best possible terms. A prospective purchaser may be shown the property by a broker and learn from him the terms of sale. The broker may or may not report the pending negotiations to his principal. Even if he informs the principal of the negotiations, he rarely, at this stage, discloses who the proposed purchaser is, for fear the principal may be tempted to deal direct.

Meanwhile the proposed purchaser, looking for other property, comes into contact with other brokers in the same vicinity, and is perhaps shown the same property which the first broker has already shown him. In many cases the prospective purchaser does not disclose to this second broker the fact that another broker has already shown him the property, but gets the best terms he can from the second broker, who, in his turn, fails to disclose the name of the prospective purchaser to the principal.

Sometimes the purchaser deals at once with the second broker if this latter holds out any hope of obtaining the property on more favorable terms. Sometimes, however, the purchaser returns to the first broker, either because the first broker held out better hopes or because the purchaser desires to inform this first broker that he, the purchaser, has been offered the property under more favorable terms. He does this expecting the first broker to do even better for him.

The contest is then on. The principal is besieged by

¹ See §§ 97, 98, 237 *supra*.

both brokers, and, not knowing that both have the same buyer, imagines that two prospective purchasers are all at once very anxious for his property. This sometimes makes him quite independent.

When a sale is finally brought about, the principal finds that he has on his hands a difficult proposition. He does not want to pay two commissions for the one sale. If, however, he undertakes to determine the question and pays the commission to the broker whom he decides to have been the procuring cause of the sale, a court or a jury may subsequently, on the suit of the other broker, decide that his decision was in error, and then the principal, though wholly innocent of any wrong, is obliged to pay the judgment obtained by the second broker or take an expensive appeal.

Even if he takes the second course he would undoubtedly be informed by the appellate tribunal that while it deploras a situation which subjects the principal to double payment, yet the whole matter was a question of fact, and as there was evidence upon which the jury could have reached the verdict it rendered, the appellate court did not feel inclined to disturb the verdict.

The principal may go still further and ask the first broker to whom he voluntarily paid the commission, to return it. The first broker replies that he feels that *he* earned the commission, and adds that as he was not a party to the litigation already had, he was not given an opportunity to show in court that he had earned the commission. The principal may now sue the first broker. The result is not always certain. The first broker may even be successful in establishing before another court or jury that he is the party who is actually entitled to retain the money.

When the principal has thus dragged himself through the court proceedings, he finds that it has cost him two commissions, and in addition, several times the amount of

an ordinary commission in the cost of the litigation, and that he is worse off than if he had voluntarily paid both commissions in the beginning.

In such circumstances, may the principal avoid all this expense and trouble by resorting to the remedy known as interpleader?

§ 340. Nature of Interpleader.

“A bill of strict interpleader is one in which the complainant asserts his possession of some fund or something in which he claims no personal interest, but in which other persons whom he makes defendants set up conflicting claims, and the complainant cannot safely determine to which claim he should yield.”² No attempt will be made to enter into details concerning the derivation and particular nature of interpleader, nor whether interpleader exists in common law actions only by virtue of statute or not, as our object is to confine ourselves as closely as may be to the subject of interpleader in relation to double claims for the same commission.

The question may arise in three ways: (1) where both brokers bring separate actions for the same commission, and the principal asks that the actions be joined, as it were, into one, and that he may drop out of both upon paying the commission into court, and leave the brokers to fight it out between them, or that he, the principal, may be compelled to contest but one suit; (2) where one of the brokers brings suit and the principal asks that the other broker, who also makes claim, be joined with or substituted for the principal in the suit; (3) where neither broker brings suit, but both make claim, and the principal takes the initiative and brings suit against both brokers to determine the conflict.

² Metropolitan Life Ins. Co. v. Hamilton, 70 Atl. 677 (N. J. 1908)

§ 341. Interpleader Permissible in Broker's Commission Cases in Some States.

In New York there have been cases which held that the right to interplead in brokers' commission suits did not exist,³ but the right to interplead adverse claimants to a brokerage commission on the sale of realty is now recognized there.⁴ Where there is no pretense or suggestion that the owner has rendered himself liable to double commissions, and he concedes his liability to one or the other of the claimants, but is unable to determine between them and is unwilling to do so at his own risk, the owner may pay the money into court and interplead the rival claimants.⁵

And in *Rogers v. Picken Realty Co.*, 55 Misc. 199 (N. Y. 1907), where two brokers claimed commission on the same sale, interpleader was held proper, the court distinguishing other cases in which each claim was based on a separate contract. Here it was held that where there is in the hands of a defendant money which belongs to the plaintiff or a third person, and is claimed by both of them, and the holder of the fund has no interest in the subject matter, and the question to be determined is the title to the particular fund in respect to which the claims are made, an order substituting the second claimant in place of the original defendant may be made. And in Pennsylvania interpleader has been granted to determine conflicting claims to the same brokerage commission.⁶

§ 342. Interpleader Not a Universally Recognized Right.

The subject of interpleader is not, however, free from doubt. A typical and at the same time a recent case which

³ *Cohen v. Cohen*, 35 Misc. 206 (N. Y. 1901); *Olsen v. Moran*, 50 Misc. 655 (N. Y. 1906).

⁴ *Dardonville v. Smith*, 133 App. Div. 234 (N. Y. 1909).

⁵ *Trembley v. Marshall*, 118 App. Div. 839 (N. Y. 1907).

⁶ *Brooke v. Smith*, 13 Pa. Co. Ct. 557 (1893).

presents the question as it very frequently arises is that of *Maxwell v. Frazier*, 96 Pac. 548 (Ore. 1908). Maxwell engaged Frazier, a real estate broker, to sell his property for him at a fixed price and for a commission of \$50. At the same time Maxwell, as he had a right to do,⁷ engaged Hurst also to sell the property. Hurst claimed that his commission was not fixed in advance, but that he was to receive the reasonable value of his services.

Presently Maxwell sold the property to one Corby, and being unable to determine whether Frazier or Hurst was the procuring cause of the sale, came into Court, admitting that he owed \$50 commission either to Frazier or to Hurst for procuring the purchaser, but alleging that they both claimed it and were threatening to bring action against him therefor and that he was unable to decide, without hazard to himself, to which it belonged.

Maxwell brought this interpleader suit without collusion with either Frazier or Hurst, and tendered the sum of \$50 into court for the benefit of the successful claimant. One of the brokers contended that the case was not a proper one for interpleader. The court in upholding this contention said: " ' It is essential to the right to file the bill that there be two or more claimants to the fund in dispute, capable of interpleading and settling the matter between themselves.' "⁸ The issues must be between the defendants as to their right to the same specific thing or fund, and not an issue with the plaintiff as to separate claims against him. Mr. Justice Wolverton in *North Pac. Lbr. Co. v. Lang*, 28 Or. 246, 258; 42 Pac. 799, 803; 52 Am. St. Rep. 780, in discussing this remedy and when it may be invoked, says: ' One of the essential requisites to equitable relief by bill of interpleader is that all the adverse titles of the respective claimants must be connected or dependent or one derived from the other or from a

⁷ See §§ 97, 98, 237 *supra*.

⁸ Citing 23 Cyc. 5.

common source. There must be privity of some sort between all the parties, such as privity of estate, title or contract, and the claims should be of the same nature and character. In cases of adverse independent titles or demands, actions to determine the rights of litigants must be directed against the party holding the property, and he must defend as best he can at law. * * * Thus, where the only relation which the plaintiff sustains to the defendants is that he is the debtor of one of them, he cannot invoke the aid of an interpleader.' To the same effect is 23 Cyc. 3-8. In the case before us, each of the defendants relies upon a separate contract with the plaintiff. There is no privity between them, but they are claiming on independent demands. Neither defendant is claiming the commission through any privity with the other. The plaintiff is not a stakeholder, but his liability to each of the defendants, if liable at all, is upon a personal contract, and the bill will not be entertained to try out a mere legal liability of the plaintiff to a defendant. Such is not the province of a bill of interpleader. The creditor is entitled to his remedy at law. A parallel case to the one at bar is *Sachs v. Farrar*, 35 Ill. App. 277. The vendor of real estate filed a bill requiring two real estate agents to interplead as to which was entitled to commissions for the sale, and it is held that as their claims were upon independent contracts with the vendor, and not by title derived by one from the other, the vendor must make the best defense he can at law, and interpleader will not lie. In (*First Natl.*) *Bank v. Bininger*, 26 N. J. Eq. 345, it was held that the true doctrine is that in cases of adverse independent titles, the party holding the property must defend himself at law as best he can. *Hoyt v. Gouge*, 125 Iowa 603; 101 N. W. 464, which is also a suit to require real estate brokers to interplead, is to the same effect. Also see (*Third Natl.*) *Bank v. Skillings Lbr. Co.*, 132 Mass. 410. Therefore the case was not a proper one for interpleader.

Where a bill of interpleader is filed, the practice is first to determine whether such a bill will lie. If it will not, it is useless to go further. If it will, then, upon bringing the property in dispute into court, the complainant is discharged from further liability with his costs to be paid out of the deposit, and issues cannot be made against him except as to whether the case is a proper one for interpleader. But the court will require the defendants to interplead and litigate their respective rights to the fund in dispute.”⁹

§ 343. Method of Procedure.

The procedure with respect to interpleader is, in many states, regulated by statute. Among the states which regulate the matter by statutory provision are New York,¹⁰ Massachusetts,¹¹ Ohio,¹² California,¹³ Delaware,¹⁴ Connecticut,¹⁵ Oregon,¹⁶ and Georgia.¹⁷ New York has very explicit statutory provisions, which are presented here for illustrative purposes.

Section 820 of the New York Code of Civil Procedure, providing for interpleader in a contract action which is pending, is as follows: “A defendant against whom an action to recover upon a contract or an action of ejectment, or an action to recover a chattel is pending, may, at any time before answer, upon proof by affidavit, that a person, not a party to the action, makes a demand against him for the same debt or property, without collusion with him, apply to the court, upon notice to that person and the adverse party, for an order to substitute that person

⁹ Citing 23 Cyc. 31; North Pac. Lbr. Co. v. Lang, 28 Ore. 246; 42 Pac. 799; 52 Am. St. Rep. 780; Newhall v. Kastens, 70 Ill. 156; Duke L. & Co. v. Duke, etc., 93 Mo. App. 244.

¹⁰ N. Y. Code of Civ. Pro., §§ 820, 820a; Mun. Ct. Act, § 187.

¹¹ Rev. Laws of Mass. (1902), Ch. 173, § 37.

¹² Bates Ann. Ohio Stats., § 5016.

¹³ Cal. Code of Civ. Pro., § 386.

¹⁴ Del. Rev. Code, Ch. 106, §§ 34, 35.

¹⁵ Gen. Stat. of Conn. (Rev. of 1902), § 1019.

¹⁶ Oregon Ann. Codes and Stats., § 40.

¹⁷ Ga. Code, Art. 3, Ch. 6, §§ 4896 *et seq.*

in his place, and to discharge him from liability to either, on his paying into court the amount of the debt, or delivering the possession of the property, or its value, to such person as the court directs; or upon it appearing that the defendant disputes, in whole or in part, the liability as asserted against him by different claimants, or that he has some interest in the subject matter of the controversy which he desires to assert, his application may be for an order joining the other claimant or claimants as co-defendants with him in the action. The court may, in its discretion, make such order, upon such terms as to costs and payments into court of the amount of the debt, or part thereof, or delivery of the possession of the property, or its value or part thereof, as may be just, and thereupon the entire controversy may be determined in the action."

Section 820a of the same code, added to take effect September 1, 1908, allows a debtor to bring an action of interpleader when any sum of money shall be due and payable under or on account of a contract and the whole or any part thereof, exceeding fifty dollars in amount, shall be claimed or demanded by adverse claimants. The text of this section is as follows: "When any sum of money shall be due and payable under or on account of a contract, and the whole, or any part thereof, exceeding fifty dollars in amount, shall be claimed or demanded by adverse claimants thereto, the debtor may bring suit in any court having jurisdiction thereof and of the parties, demanding judgment of interpleader, and that the debtor be permitted to pay the amount of the debt into court, and that such debtor upon such payment into court be discharged from any further liability to any of the parties to the action. When service of the summons and complaint shall have been made upon all such claimants, the plaintiff may make application, by petition or upon affidavits for an order permitting and directing the plaintiff

to pay the amount of the debt into court, and that the plaintiff, upon the payment into court of the amount of the debt as required by the order, be discharged from any further liability to any of the defendants in such action, and the court, upon satisfactory proof by affidavit or otherwise, as the court may require, of the facts alleged in the complaint, and that the whole or part of the debt is claimed adversely by the defendants without any collusion on the part of the plaintiff, and that the amount thereof is not in dispute may make such an order, upon such terms as to costs and disbursements payable out of the money so adversely claimed as to the court may seem just, and upon the payment into court of the amount of such debt, and complying with the terms of such order, the plaintiff shall stand discharged from any further liability to any of the defendants in said action upon account of such debt and contract. Notice of such application, together with copies of the papers upon which the same is made, shall be personally served on each of the defendants, at least five, and not more than fifteen days before the return day thereof."

Section 187 of the Municipal Court Act of New York City ¹⁸ provides for interpleader in certain cases as follows:

"A defendant against whom an action to recover upon a contract, or an action to recover a chattel is pending, may, at any time before answer, upon proof, by affidavit, that a person not a party to the action, makes a demand against him for the same debt or property, without collusion with him, apply to the court, upon notice to that person and the adverse party, for an order to substitute that person in his place, and to discharge him from liability to either, on his paying into court the amount of the debt, or delivering the possession of the property, or its value,

¹⁸ The Municipal Court of the City of New York is of limited jurisdiction, and, speaking generally, has jurisdiction of civil actions involving \$500 or less.

to such person as the court directs; or upon it appearing that the defendant disputes, in whole or in part, the liability as asserted against him by different claimants, or that he has some interest in the subject matter of the controversy which he desires to assert, his application may be for an order joining the other claimant or claimants, as co-defendants with him in the action. The court may, in its discretion, make such order, upon such terms as to costs and payments into court of the amount of the debt, or part thereof, or delivery of the possession of the property, or its value or part thereof, as may be just, and thereupon the entire controversy may be determined in the action."

§ 344. Interpleader When Action Brought in Court Having No Jurisdiction to Interplead.

Where two brokers claim commission on the same sale to the same purchaser, and one of them sues the vendor for the commission in a court without jurisdiction to accord the right of interpleader, the vendor may bring an action of interpleader in a court having such jurisdiction as, for example, in New York where such action of interpleader may be brought in the Supreme Court.¹⁹ This applies, of course, only in those states where interpleader in broker's actions is allowed.

§ 345. Requisites of Interpleader.

Even where interpleader in brokers' actions is permitted, sufficient grounds for the interpleader must, of course, be shown. Fragments of the essentials of interpleader are given in the various cases and general treatment is accorded the subject in text books and encyclopedias. The danger of a double vexation must be real, and

¹⁹ *Dardonville v. Smith*, 133 App. Div. 234 (N. Y. 1909).

a mere suspicion of a risk will not be sufficient to warrant interpleader.²⁰

Various authorities lay down different conditions under which the remedy may be invoked, among them being that no other adequate remedy exists; proper showing of the identity of the thing claimed; privity of estate, title or contract between the various claimants; that the person seeking the interpleader has no beneficial interest in the thing claimed; that he cannot determine without hazard to himself, to which of the defendants or claimants the thing belongs, etc. The authorities are, however, not uniform in holding that all these conditions must exist, and the authorities given in the various annotated codes and the digests should be consulted to ascertain the extent of the views of the courts of each state.²¹

§ 346. Interpleader Makes Actions at Law Equity Suits.

Where a third party is interpleaded in an action at law, the action becomes one in equity. We shall not attempt to go into explanatory details showing how this is brought about. It is sufficient to refer to the matter and indicate a few authorities.²²

²⁰ *Metropolitan Life Ins. Co. v. Hamilton*, 70 Atl. 677 (N. J. 1908), (citing *Blair v. Porter*, 13 N. J. Eq. 267; *Fitch v. Brower*, 42 N. J. Eq. 300; 11 Atl. 330; *Atkinson v. Manks*, 1 Cow. (N. Y.) 691; *Crane v. McDonald*, 118 N. Y. 648; 23 N. E. 991).

²¹ *Crane v. McDonald*, 118 N. Y. 648 (1889) contains a discussion of the subject.

²² *Vandewater v. Mut. Reserve L. Ins. Co.*, 44 Misc. 316 (N. Y. 1904). See also *Clark v. Mosher*, 107 N. Y. 118 (1887); *Windecker v. Mut. Life Ins. Co.*, 12 App. Div. 73 (N. Y. 1896). As to interpleader proceedings in actions in the City Court of New York, making actions at law equitable actions, see *Schreiber v. Dry Dock Sav. Inst.*, 59 Misc. 408 (N. Y. 1908).

PART VI.—CONTRACTS FOR SALE OF REAL ESTATE.

CHAPTER XXXVI.

AGREEMENTS RELATING TO THE SALE OF REAL ESTATE.

§ 347. Method of Presentation.

In the preceding chapters of the present volume, every proposition is fortified by the citation of authority. In this chapter the citation of authorities is omitted. This is so because a discussion of contracts for the sale and exchange of real estate, adequate for reference on all of the many varying occasions which are constantly arising, might of itself occupy an entire volume.

The present chapter therefore makes no pretence to be a reference help, but confines itself to a practical discussion of the more important matters to be considered when such contracts are drawn.

§ 348. Nature of a Sale.

It is often supposed that there is something palpably illegal in attempting to sell real estate without entering into a preliminary written agreement designed to bring about the conveyance of the property. This, however, is erroneous, for two persons may lawfully agree orally to the sale and purchase of real estate, and if they carry out their oral agreement by the final conveyance of the property by deed, the absence of a written contract is of no

consequence. Indeed, very anciently the transfer of title to real estate was itself quite informal. An oral declaration of transfer made upon the land, or the symbolic delivery of the property by the delivery of a twig of a tree growing on the land, and the like, were among the early methods of transferring title.

However satisfactory these methods may have been in primitive days, they would be utterly insufficient now. If employed, they would lead to endless confusion and litigation and to a deplorable lack of certainty in the security of one's title to land. To avoid all this, the law makers long ago required such agreements to be in writing. The subject is almost universally regulated by statute, known in nearly all jurisdictions as "The Statute of Frauds."¹

§ 349. Usual Methods of Concluding a Sale.

Ordinarily a sale of real estate is brought about by real estate agents, or less frequently by the parties themselves. The services of a lawyer are scarcely ever sought until the negotiations are well under way and frequently not until all the details have been practically agreed upon and a deposit paid on account. The wisdom of this is doubtful, but the conditions are sometimes such as to render it unavoidable.

When the seller of real estate has been offered terms with which he is satisfied, he is anxious to "strike while the iron is hot." And the purchaser, offered the property at a price satisfactory to him, is more than willing to have the transaction "clinched" at once by a written contract. Also, the broker when he has performed his part in the sale of real estate by bringing about a meeting of the minds of the parties, is naturally anxious to see that understanding perfected by a written contract.

¹ See § 350 *infra*.

In some states he must secure an enforceable contract before he is entitled to his commissions.²

Under such circumstances no deliberation is indulged in and the contract is usually drawn on the spot or at the nearest convenient place, with such knowledge, or lack of knowledge of the requirements and effect of an agreement of sale of real property as the parties may themselves possess. And yet, as we shall see later, the contents of the written contract are of the utmost importance.

A contract for the sale of real estate should be drawn with the greatest care, and, whenever circumstances permit, before signing it the vendor should produce his title deeds, abstracts, or title insurance policies and be ready to furnish accurate information concerning the property and his title thereto.

The reason for submitting the title deeds, abstracts, or title insurance policies for examination is found in the fact that from such documents it will usually appear what encumbrances and defects the vendor's title is burdened with, and provision may be made in the contract accordingly. Usually the purchaser makes up his mind to buy after a physical inspection of the property, and it is quite immaterial to him whether there are party walls, restrictions, street railroads, etc. In fact, all these may only serve to make the property more desirable to him, and if discussed at the time of making the contract, little difficulty will usually be found in arriving at an agreement properly providing for or against such matters.

But after a contract is once signed, if nothing is said therein about these matters, "experienced purchasers"—or perhaps their attorneys—scent all manner of future difficulty on account of these very things, and, as the existence of some of them may sometimes afford sufficient ground to justify the purchaser in refusing to carry out the contract, the vendor has the alternative of making an

² See §§ 117-119 *supra*.

“ allowance ” on the price, or of involving himself in litigation which may tie up the property for many months.

§ 350. Oral Agreements and Informal Written Agreements.

As already stated, the parties to an agreed sale of real estate sometimes find it inexpedient to delay long enough to adjourn to some convenient place to draw a formal contract. In such case a money “ deposit ” is usually paid by the purchaser “ to bind the bargain ” and a “ receipt ” for the money is given. Sometimes these “ receipts ” contain the elements of a contract and serve the purposes of a more formal instrument and are enforceable as contracts by the purchaser.

We shall refer to the essentials of a contract presently, but here we shall only discuss the legal status of the parties where a “ deposit ” is paid and no writing is entered into, or where the writing entered into does not measure up to the dignity of a contract.

If the vendor of real property has accepted a deposit and has not signed such a “ receipt ” as might be construed to be a valid contract in writing, he may, when called upon to transfer the property, refuse to do so, provided he returns the deposit. He cannot, however, refuse to transfer the property and still keep the deposit.

On the other hand, if the purchaser when called upon to complete the transaction, does not then wish to purchase the real estate, he may refuse if he will but he cannot recover his deposit. He cannot be forced to complete his undertaking, but he forfeits the money he has already paid.

The reason for this advantage which the seller has over the buyer, springs out of the Statute of Frauds before referred to.³ This statute usually provides that every agreement for the sale of real estate must be in

³ § 348 *supra*; see also §§ 31-37 *supra*.

writing, signed by the vendor or his agent. This being true, the vendor is never bound by an unwritten agreement to sell, except in the rare cases where he permits the buyer to enter into possession of the property, which is usually referred to as part performance and takes the transaction beyond the point where it is affected by the Statute of Frauds. The subject of part performance is too intricate for discussion here. It is sufficient to say, however, that the authorities are in practical unanimity that "part payment" of the purchase price is not part performance, and does not of itself bind the vendor.

The general proposition may be restated briefly thus: Where a deposit has been made to bind an oral agreement for the sale of real property and the receipt does not amount to a valid contract, the purchaser, if he refuses to complete the agreement—the vendor being able and willing,—cannot recover his deposit. On the other hand, if the seller is not willing to carry out the agreement or is unable to do so, the purchaser cannot enforce specific performance but may recover his deposit.

If the seller tenders performance, the purchaser cannot raise the question of no written contract. He must either perform his part of the agreement or lose his deposit. The seller may, however, raise that question and decline to proceed with the agreement if he so desires, merely returning the purchaser's deposit. This is so because the Statute of Frauds almost everywhere provides that the contract must be signed by the vendor or his authorized agent, but no requirement is made as to the purchaser's signature.

§ 351. Options on Real Estate.

We have already discussed the broker's status when he procures an option.⁴ A general idea of the nature of

⁴ This discussion occurs in §§ 149, 163 *supra*.

an option is, however, not without value. An option on real estate is an exclusive privilege to buy such real estate, and a contract for an option, or option contract, is the agreement by which the privilege is created. It neither transfers nor agrees to transfer title to the property, but confers upon its holder the right, within the time limited by the option, to buy the property upon the terms provided.

The option is a one-sided agreement, not binding on the holder until accepted by him, but the moment the holder or the proposed purchaser accepts the option, both parties are bound—the owner to sell, and the purchaser to buy. The acceptance of the option may be in writing, or by mere assent, or by tender of the price.

The term “acceptance” as used in connection with an option must be understood. The mere physical “receiving” of the written offer which constitutes the option is not an “acceptance.” An assent to the offer contained in the option is necessary to constitute an acceptance.

An option, *unless founded upon a consideration*, may be revoked or withdrawn at any time before acceptance, and it has been held that a sale of the property to another party amounts to a withdrawal. It is essential, too, that the option shall be in writing and be signed by the vendor.

§ 352. **Essential Features of a Contract for Sale of Real Property.**

The essentials of a valid contract for the sale or exchange of real property are the same as for any other contract, with the added requirement that it must be in writing and be signed by the vendor. No particular words are necessary. A contract is sufficient if it gives the names of the seller and the buyer, and expresses the

consideration and describes the land to be conveyed. The agreement must be mutual—binding upon both parties. In most states no seal is required.

The books abound with cases in which the courts have passed on various writings and have either sustained or rejected them as contracts. Some authorities say that the contract may be made up of several writings, even if some of the writings are addressed to a third party, that it need be signed only by the seller and that the land may even be identified orally. Others say that the paper should state the whole contract with reasonable certainty so that the substance of it may be made to appear from the record itself without resort to any oral evidence. But all this uncertainty arises usually by reason of the parties trusting to informal writings or mere "receipts" and would not arise if formal agreements, blanks for which are almost everywhere obtainable, were entered into.

§ 353. Parties to the Contract.

In contracts relating to the sale of real estate, as in any other contracts, there must always be two parties. The parties must be capable of contracting. Usually infants or persons of unsound mind cannot contract. Application to the courts is necessary in such cases and also in the case of certain corporations whose objects are religious, charitable and the like. The law in some states imposes on married women limitations in respect to their right to make contracts.

The owner of the property may make the contract in his own name as vendor, but in all cases it is advisable if he is married, to have his wife join in the contract as this often avoids troublesome complications later. In some states the husband must join in a contract made by the wife for the sale of her real property.

The right of an alien to make a contract for the sale of real property is another of those questions concerning which much may be said. It is a matter of local regulation, but in modern times the rights of aliens with respect to real estate have been so much enlarged that they may contract practically without limitation.

A person may make a contract to sell property even though he does not own it, but if he fails thereafter to acquire the title or to procure a conveyance in accordance with his contract, he subjects himself to damages.

Business corporations are competent to make contracts for the sale of realty. The rights of executors, trustees, administrators and guardians to make such contracts present further questions. An executor or trustee who is given power of sale under a will, may usually sell without application to the court. And so may an "administrator with the will annexed," who succeeds to the executor's power of sale. Otherwise application to the court is necessary and reasons for sale must usually be shown. Where there is any doubt as to whether application to the court is necessary, it is always advisable to insert in the contract that the sale is "subject to the approval of the court," and this affords at least some protection in some cases.

§ 354. Execution of Contract of Sale.

The parties to a contract for sale of real estate may sign it in person, or it may be signed for either party by the agent of that party. The broker's right to contract has already been discussed fully.⁵ If the contract is made by a person acting in a representative capacity, such as an executor for instance, he may sign the contract with his own name without adding his official title at the end of the signature, provided he is described in

⁵ See Ch. IV *supra*.

the contract in his representative capacity. If he is not so described, but still signs without proper addition of the official title to his signature, he becomes individually liable.

It is also said, and in some states declared by statute, that an instrument executed by the grantee of a power, as for instance an executor or trustee with power of sale, conveying an estate or creating a charge which he would have no right to convey or create except by virtue of the power, shall be deemed a valid execution of the power, although the power be not recited or referred to therein. For example, if A is by deed or will given power to sell real property, and he has no beneficial interest in the property itself or in the proceeds of a sale thereof, a deed naming A merely as an individual, and signed by him as an individual, would in such case be held a conveyance by virtue of the power.

On the other hand, if A is given such power to sell and is beneficially interested in the property or in the proceeds of sale, a deed by him as an individual would convey only his individual interest, and in order to convey the entire property by virtue of his power of sale, it would be necessary either to describe him in the deed as trustee, executor, or whatever his official title may be, or that the deed contain a recital that it is made under the power of sale, or, at the very least, that A sign the deed with the words "as trustee, etc.," "as executor, etc.," as the case may be, added to his name. Failure to observe this distinction in the signing of such instruments sometimes leads to considerable difficulty.

No particular form of signature is necessary to bind a corporation. And it has been held that the agent who affixes the signature of the corporation need not add his own name after that of the corporation. It is always better, however, to have the full corporate signature affixed to the contract by some authorized officer and to

have the corporate seal attached. Otherwise it may be difficult, when necessary, to prove the authority of the person who signed for the corporation. In any such case the name of the corporation is affixed, followed by the official signature of the affixing officer.⁶

It is always advisable to have a contract for sale of real estate acknowledged by the parties, as in some states a contract duly acknowledged is admissible in evidence without further proof, which is not the case when the acknowledgment is omitted.

⁶ See §§ 44, 46 *supra*.

CHAPTER XXXVII.

SUBJECT MATTER OF CONTRACTS FOR SALE OF REAL ESTATE.

§ 355. Drafting Contract for Sale of Real Estate.

Regular forms of contract are easily obtainable at any law stationer's.¹ Hence, the elemental essentials of such contracts need not be discussed. Having this form, the question arises, How shall its blanks be filled?

First of all, it is absolutely imperative that all the oral understandings of the parties be reduced to writing and put into the contract. If the vendor orally agrees that he will "throw in" with the sale the carpets, chandeliers or other personal property on the premises, see that it is so stated in the contract. If he resorts to the old-fashioned—and we may say somewhat conceited—language that "his word is as good as his bond," and that if he says he will allow the personal effects mentioned to pass with the property or makes any other oral agreement, he means all he says, the statement is in no-wise binding and should be declared unsatisfactory. If the vendor means to keep his promise, he should have no objection to putting it in writing.

It is not wise to rest anything on a mere "understanding" between the parties. When once a written agreement is made, the law holds that all the understandings and arrangements of the parties are included in this written agreement, and oral evidence is not admissible to contradict or vary its terms. There are ex-

¹ See the forms used in various states, given in Part VII—Forms 17-31, Ch. XXXIX *infra*.

ceptions to this rule of law but we shall not state them here. Compliance with the rule is always safe and is much more satisfactory than to attempt to determine when exceptions may safely be made.

§ 356. Description of Property in Contracts of Sale.

Failure to properly describe property in the contract for its sale has given rise to much litigation. Often the contract is entered into so hastily that it is impracticable to obtain any accurate description for inclusion in the contract.

The courts say that the contract must specifically or with sufficient certainty describe and identify the land proposed to be conveyed. There are various ways of identification—a declaration as to its present ownership; reference to an earlier deed; by the enumeration of the particular grants of which a tract is composed; by a street number, etc.

All these methods are, however, unsatisfactory. There should be a detailed description of the property itself. The state and county in which the land lies should be given, and in states where land is so subdivided, the range, township, section and quarter section of which it forms a part should be set forth.

From the viewpoint of the buyer, the frequent practice of describing city property by street number alone is most unsatisfactory as well as dangerous. When property is thus referred to by street number alone, the purchaser must accept a deed of the property bearing the street number, regardless of its actual dimensions. He may have understood the property to have a frontage of 100 feet, but if the property bearing that street number has a frontage of but 75 feet, he is bound to accept its transfer in satisfaction of his contract, unless he has been misled by misrepresentations. If the property is

described by street number and also by dimensions, the purchaser is entitled to the frontage given by the dimensions in the absence of any other modifying circumstances.

The best method is to describe the property by metes and bounds. By this is meant that the actual distance in feet and inches from the starting point be stated, that the courses be stated, together with the specific distance of each course, and also whether the courses run parallel to side streets or at right angles to the main street, and if the courses run through party walls, that fact should be distinctly stated.

A party wall may be defined as a wall which serves for two buildings. This perhaps is not a technical definition but is at least one which may be easily understood. The courts have held that under certain conditions a party wall may be an encumbrance upon land. In other words, situations frequently arise where the existence of a party wall between two buildings may give to either owner legal rights, known as "easements," in the property of the other. In such case the party wall is an encumbrance, and while this is not ordinarily of such a nature as to be seriously detrimental to the property, it may under certain conditions be sufficient and good ground to refuse to take title to the property, and the possibility of complication should be avoided by stating the facts.

Generally the existence of an encumbrance on real property not mentioned in the contract for the sale of this property, gives the purchaser the right to reject the title and sue for damages. The damages are usually made up of the amount paid on the contract, the expenses of examining the title and of surveying the property, and (though not in all cases) the difference between what the property is actually worth (its market value) and the price stated in the contract.

The parties to a contract for the sale of real estate may, of course, modify or wholly annul the rights and liabilities which the law imposes on each. For instance, they may agree that if the purchaser fails to perform, the seller may retain the deposit as liquidated damages and that the contract be then deemed null and void. Or they may agree that if the seller is unable to make good title he shall return the deposit, or the deposit in addition to certain expenses, and that the contract then become inoperative. Or they may agree that the failing party shall be liable to the other in a fixed amount as liquidated damages. Or they may agree upon the situation of each in case the title is unmarketable. Indeed, the variations which may be engrafted upon the legal status of the parties are numerous.²

§ 357. Statement as to Ownership in Adjacent Streets or Highways.

Another question which frequently arises and concerning which a clear statement should be made in the agreement of sale, is whether the seller intends to transfer with the land his ownership in the street or highway adjacent to the land. The courts say it is a matter of intention, but at the same time in a contract of sale this intention is usually sought to be found in the language used in describing the property.

The rule frequently announced is that the bounding of a lot by the exterior line of an abutting street, i. e., the line separating the property from the street, as contradistinguished from bounding it by the street, excludes from the conveyance any part of the abutting street, unless there be circumstances indicating a different intention. Thus, where the description commences upon the *side* of a street, as for instance “beginning at a

² See Forms 17-31, Ch. XXXIX *infra*.

point on the northerly side of East Fourteenth Street," and thence along that side to a point specified, the general construction is that no ownership in the street is thus conveyed.

But where the property is bounded by or is described as on or along a highway or street, or running along a highway or street, without restricting or controlling words, as for instance "and thence along East Fourteenth Street" as distinguished from "thence along the northerly side of East Fourteenth Street," the general rule is that the grantor's title in the land to the center of the street or highway is included in the grant.

Where the contract binds the purchaser to pay a specific sum per acre and bounds the property "by" certain roads, it is held that the purchaser is not required to pay for any acreage included in the highway itself.

And where lots are described by lot numbers with reference to a map on which the lots appear as bounded by a street, the conveyance will be assumed to include the abutting streets to the centre whether or not at the time of the conveyance the streets have been actually opened. This presumption will not, however, hold if succeeding words in the conveyance limit the effect of the reference to the map, as where the reference to lot numbers is followed by a specific description which limits the lots to the *side* of the street, or where the description contains appropriate words to indicate an intention to exclude part of the abutting streets.

If the purchaser desires to assure himself that his title extends to the center of the street or highway, he may well require a specific statement to that effect, which usually takes the form of a clause at the end of the description, somewhat as follows: "Together with all the right, title and interest of the party of the first part (or grantor) of, in and to the streets and avenues in

front of and adjacent to said premises to the center lines thereof respectively." This usually settles all doubt.

§ 358. **Statement of Gross or Acreage Price.**

Another question sometimes arising is whether the parties intended to sell and buy for a gross sum though the acreage is mentioned, or according to a certain price per acre though the acreage is not mentioned. If proper words are chosen to express the intention of the parties, there can be no difficulty. While we cannot dwell on the different phases of the question, we may state that the safer method is this:—If it is intended to sell a plot of unknown acreage at a fixed price per acre, it should be distinctly stated that the acreage is then unknown or uncertain, that the price is so much per acre, and that the exact acreage is to be determined by subsequent survey or agreement of the parties. If the sale is intended to be for a gross sum for the entire land irrespective of the number of acres, then, although the approximate acreage may be stated if insisted upon, it should be made to appear specifically that the price was fixed irrespective of the number of acres within the plot.

§ 359. **Statement of Easements, Negative Easements, Encroachments, Etc.**

Closely involved in the description of the property and therefore discussed under that head, are certain rights or encumbrances known as easements, negative easements, and the like. To one of these we have already referred when the matter of party walls was spoken of. Another is a matter of restrictions. If the property is restricted and this is not stated in the contract for sale, the purchaser has a legal right to refuse to accept the proffered title. This is because restrictions, or as the matter is popularly known, "covenants and restric-

tions"—by which is usually meant covenants against the erection of certain nuisances, or restrictions against certain uses of the property—are encumbrances and what are known in law as “negative easements,” and if not specified, give the purchaser the right to refuse to complete the contract and to demand damages as already mentioned.

Another factor in the passing of titles to real estate, especially in cities, is the matter of encroachments. The buildings on the land to be conveyed may encroach upon adjoining land, or buildings on adjoining lands may encroach upon the land to be conveyed. Then, too, the buildings or some addition thereto on the land to be conveyed may encroach upon the street. If the vendor has taken the wise precaution of having his property surveyed before entering into a contract of sale he may usually ascertain whether the proposed purchaser is willing to accept the property as shown by the survey, and make his contract accordingly.

The matter of encroachments is not only a fruitful source of litigation but a troublesome proposition besides. Encroachments (not provided against in the contract) must be substantial to warrant the refusal to take the title contracted for. That is, the law does not recognize immaterial encroachments. *De minimis lex non curat*. The difficulty, however, always is to make up one's mind as whether the encroachment is *material*. The question is often a very close one in the courts. Then, too, the matter is often affected by local statutes which, in effect, permit encroachments to a small extent if they have existed for stated periods, while local ordinances permitting encroachments of stoops, store windows, bay windows and the like to a limited extent upon the street, may also be found. Often the matter of encroachments may be obviated by so-called encroachment agreements. Such agreements really amount to a con-

sent to the existence of the encroachment by the person who might proceed for its removal. Sometimes, but rarely, the encroachment agreement goes further and grants the soil encroached upon.

The encroachment agreement is usually employed where the buildings on the land to be conveyed encroach upon adjoining land. If buildings on adjoining land encroach substantially upon the land to be conveyed, the vendor is usually unable to convey all the land contracted for because, as is obvious, the part encroached upon cannot be conveyed except with the burden of the encroachment, and in some cases the vendor has no means of remedying the matter. Even in such cases, however, arrangements are sometimes made which enable the title to be passed to the satisfaction of the parties. Forms of encroachment agreements are given elsewhere.³ These remarks, which scarcely open up the subject of encroachments, must suffice for this chapter which, as has been stated, is not intended as a presentation of the law of real estate contracts but merely as a suggestive and advisory discussion in connection with the precautions to be observed in drawing a contract of sale.

“ Railroad consents ” should also be specified, though there is doubt whether a consent to the use of the street for railroad purposes would be a proper objection to a title, particularly if the railroad is in actual operation.

§ 360. Leases of Property Held Under Contract of Sale.

If there are any outstanding leases, the contract should state that the sale is subject to same. Some conveyancers also insert a clause that the property is sold “ subject to monthly tenancies ” where that is the fact.

³ Forms 44, 45, Ch. XL *infra*.

If property is sold without such exceptions, the vendee may insist on possession of the property without any tenant thereon and may refuse title if the vendor is unable to deliver the property vacant.

§ 361. Price and Manner of Payment.

The total price to be paid for the property is usually first stated and then follows the manner in which payment thereof is to be made. Usually a fractional amount is paid upon signing the contract.

Usually the property is taken over subject to an outstanding mortgage, or, what amounts to the same thing, a "trust deed." The details of such a mortgage need not be stated, for it is held that the mortgage being of record, the purchaser is chargeable with knowledge or notice of its provisions. If the purchaser, however, wants any assurance, he may require that the details of the mortgage be given in the contract, in which case the contract statements would prevail.

The contract of sale in case of an outstanding mortgage, usually reads that the property is to be taken subject to a mortgage, but sometimes, without any reason therefor, there are added the words, "which mortgage the purchaser agrees to assume." The legal effect of this phrase seems not to be realized. It amounts to a guarantee on the purchaser's part of full payment of the mortgage. Thus if the mortgage is assumed by the purchaser, and the property is thereafter foreclosed and sold, and does not bring enough to pay the costs of the foreclosure and the amount due on the mortgage, the person "assuming" payment of the mortgage may be held personally for the deficiency. On the other hand, if he had taken the property merely "subject" to the mortgage, no resort could be had against him for a deficiency, as he personally assumes nothing, the mortgage being then sup-

ported entirely by the property and by any preceding guarantors.⁴

At times, the purchase price of property is paid in part by the purchaser giving back to the seller a mortgage for an agreed amount. Such a mortgage is called a "purchase money mortgage." Its details should always be stated in the contract of sale. If they are not, embarrassing situations may arise, not necessary to be set forth here.

In agreeing for a purchase money mortgage, in addition to the principal amount of the mortgage, the following details should be stated in the contract:—Maturity of the mortgage; rate of interest; when payable; the particular clauses, or otherwise that the mortgage is to contain "the usual clauses" in addition to any which are particularized. Also, the contract should specify who is to pay for drawing the mortgage, who bears the cost of recording it, and who is to pay any tax there may be thereon.

Where the total amount of the purchase price is to be paid in part in cash, in part by the purchaser taking over the property subject to an existing mortgage thereon, and the balance by the seller taking back a purchase money mortgage on the property, and the purchase money mortgage is consequently to be a second mortgage,—that is, subordinate in lien to the existing mortgage on the property,—the purchase money mortgage, although a second mortgage lien when made, would ascend to the position of a first mortgage if the existing first mortgage is later paid and satisfied. The result would be that the purchaser or any subsequent owner of the property could not obtain a new mortgage which would be prior in lien to the purchase money mortgage

⁴ The above is a statement of the general rule. Frequently situations arise where the purchaser "assumes" the payment of the mortgage, but the courts will, notwithstanding, refuse to enforce the apparent liability. The legal principles applicable to the various situations must, however, be sought in the works on mortgages and cannot be detailed in a chapter intended to present only suggestions and very general principles.

unless the then holder of the purchase money mortgage voluntarily or for a consideration consented. To avoid this situation, it is quite common in agreeing for a purchase money mortgage which is to remain a second mortgage lien, to insert a clause in the contract somewhat as follows: "Said mortgage is to contain a clause subordinating the same to any new first mortgage of \$. should the present first mortgage at any time be satisfied, and such clause shall further subordinate said mortgage to any new first mortgage in place of the present first mortgage, provided the excess of such new first mortgage above \$. is paid to the holder of this second mortgage on account of the principal sum, and that the holder of such second mortgage shall execute, acknowledge and deliver any instruments necessary or proper to effectuate such subordination as above agreed, provided he shall not be obliged to incur any expense in doing so (or, provided he shall be reimbursed for any expenses he may incur in doing so, to an amount not exceeding \$.)."'

§ 362. Suburban Property.

In purchasing suburban property, if the purchaser wishes to protect himself against subsequent assessments he should require a clause in the contract of sale stating that the sewer, gas and water are in the streets adjoining the property and are properly connected with it, and that there are no assessments, instalment or otherwise, against the property.

Not infrequently land companies purchase acreage and subdivide it into lots. Maps are made of the property showing it laid out into lots, these maps sometimes being accurate and made by a competent surveyor, and at other times lacking either or both of these desirable qualities. Difficulty sometimes arises with this suburban

property when the municipality or the town in which the property is situated subsequently lays out streets, the lines of which do not coincide with the streets shown on the land companies' maps. Many of these maps are not filed in the public offices at all, and purchasers must then rely on a map which is in the possession of an individual or a land company.

One of the several reasons for the reluctance to file such maps is found in the fact that if a map showing the property cut up into lots is filed in a public office, the tax assessors are apt to assess each lot separately, whereas if no map is filed the property is assessed in one parcel as farm land or woodland or meadows as the case may be, and the belief is prevalent and has some foundation, that the tax assessments are considerably less when the property is assessed as a farm or as woodland than when each lot is assessed as separately laid out.

In New York the legislature has made an effort to regulate the filing of such maps by an act which became a law on June 7, 1910. This law makes it the duty of every person who, or corporation which, either as owner or as an agent cuts up property into lots for the purpose of offering them for sale, to cause a map to be filed, and provides a penalty for failure so to do. The law is an addition to the New York Real Property Law, and in full is as follows:

“Sec. 334. Maps to be Filed; Penalty for Nonfiling. It shall be the duty of every person or corporation who, as owner or agent, subdivides real property into lots, plots, blocks or sites, with or without streets, for the purpose of offering such lots, plots, blocks or sites for sale to the public, to cause a map thereof, together with a certificate of the surveyor or draughtsman attached showing the date of the completion of the survey and of the making of the map and the name of the subdivision as stated by the owner, to be filed in the office of the county clerk

or register of deeds of the county where the property is situated prior to the offering of any such lots, plots, blocks or sites for sale. All of such maps shall be placed and kept by some suitable method, in consecutive order and shall be consecutively numbered in the order of their filing and shall be indexed under the initial letters of all substantives in the title of the subdivision. A failure to file any such map as required by the provisions of this section shall subject the owner of such subdivision, or of the unsold lots therein, to a penalty to the people of the state of twenty-five dollars for each and every lot therein sold and conveyed by or for such owner prior to the due filing of such map.”⁵

§ 363. New Buildings.

In purchasing property upon which buildings have been recently erected, it is safer to require and so state in the contract that the seller at the time of the delivery of the deed will produce and deliver to the purchaser certificates of the Tenement House Department, if such exist, or otherwise of a corresponding department, if such there be, showing that the buildings and improvements on the property have been inspected, passed and approved by the department; also proper certificates showing the right to have the property occupied, and also showing that the buildings have been passed on and approved by the proper building department or bureau. If the property is not “tenement” property, the provision with respect to the Tenement House Department is of no value and will not of course be incorporated in the contract for sale, but the building department clause should be included.

§ 364. Time for Delivery of Deed.

Ordinarily the purchaser under a contract for sale of

⁵ N. Y. Laws of 1910, Ch. 415.

real estate is accorded thirty days in which to complete his purchase—that is, to pay the balance of the purchase money and accept the deed of the property. A day is fixed for the purpose and this day is usually called the “closing of title,” or “the law day.” The day, hour and place should be precisely fixed. The form of the deed, whether warranty or otherwise, should be stated.⁶ The contract should also provide that the rents, interest on mortgages and fire insurance premiums, if any, are to be apportioned or otherwise provided for as may be agreed upon.

§ 365. Fixtures.

While it is not often so, it is a fact that sometimes a purchaser suffers keen disappointment when he sees the condition of the property at the time he actually takes it over. When the contract was signed he saw many “improvements” on the property which have disappeared when he takes his deed. This is because the vendor has meanwhile removed certain “fixtures.” Usually the purchaser has no redress.

Although not a strictly correct definition, “fixtures” in popular “real estate language” usually denote such movable articles as do not constitute part of the realty. Close questions sometimes arise as to whether certain forms of property are fixtures and therefore not passed with the sale of the real estate, or whether they are part of and pass with the real estate itself. The vendor, after he has made a contract to sell his real estate, may lawfully remove therefrom such property as shades, awnings, chandeliers, mirrors, and in some cases even gas ranges and similar articles not permanently affixed. On

⁶ We are not unmindful of the fact that there are cases which hold that a stipulation to give a warranty deed refers only to the form of the deed and not to the validity of the title. Such decisions not only are unreasonable, but have been rarely followed. The forms of contracts given in Chapter XXXIX *infra* contain the appropriate words to fully cover the situation.

the other hand, enterprising vendors are sometimes disappointed on attempting to remove laundry tubs, bath tubs, wash basins, faucets, heating boilers and water pipes, to learn that these are parts of the realty and pass with the property. Even as to these articles, however, questions have arisen where the vendor had purchased them under what is known as "a conditional sale," i. e., a credit sale where the seller of the goods retains title until full payment has been made. The only safe plan, therefore, is to have a general and inclusive provision in the contract for sale, stating that carpets in halls, chandeliers, gas fixtures, shades, awnings and the like, "are included in this sale."

§ 366. Approval Clause.

In modern contracts for sale of real estate, especially in the large cities, there is usually inserted what is known as an "approval clause." This innocent looking clause usually provides that "the seller shall give and the purchaser shall accept such a title as" a specified or "any responsible" title guarantee company "will approve and insure."

Under somewhat similar clauses the courts were formerly quite unanimous, although possibly not wholly so, that before the title could be disapproved, there must be a reasonable foundation or basis for the disapproval, but, in New York at least, the more recent decisions are quite unanimous that under such a clause the specified title company may arbitrarily refuse to approve and insure the title and that this is sufficient ground to justify the vendee in refusing to accept the same unless the approval is prevented by the purchaser's own act.

We shall not discuss the question as to whether it is the vendor's or the vendee's duty to obtain the approval or disapproval of the title under such a clause, although

that too has been an interesting controversy. Conveyancers generally favor the view that if the purchaser wishes to refuse the title, it is incumbent upon him to obtain the disapproval thereof by the specified company and that he does not have the right to refuse to accept the title merely because the vendor has not obtained the title company's approval. The "approval clause" mentioned is considered beneficial to the purchaser. The vendor rarely derives any benefit therefrom.

§ 367. General Provisions.

Other clauses of more or less obvious desirability are usually found in the printed forms of contract. None of them require special mention here.

Such standard clauses are based on legal principles, as for instance the clause that the vendor assumes the risk of loss or damage by fire until the delivery of the deed. After the contract is entered into and signed, the purchaser acquires certain equitable rights and also responsibilities, and as the seller usually retains the fire insurance policies until actual delivery of the deed, the clause referred to is inserted in the contract to place definitely the liability for any loss occasioned by fire.

The general rule is that the vendee in a contract for the sale of land is entitled to any benefits or improvements inuring to the land after the date of the contract, and must bear any losses by fire or otherwise which occur without the fault of the vendor. This applies when the title is satisfactory and the contract is capable of being specifically performed by the vendor. Such is the English rule, and, although a contrary view is taken in some jurisdictions, the great weight of authority is in its favor.⁷ The English rule is followed in equity, and where the

⁷ Sewell v. Underhill, 197 N. Y. 168 (1910), where Am. & Eng. Ency. of Law, Vol. 29 (2d Ed.), p. 713, is referred to.

doctrine is maintained it is upon the theory that the contract makes the vendee the equitable owner, and courts of equity regard that which is agreed to be done as actually performed. The reason for the provision in the contract definitely providing upon whom the loss shall fall in case of fire, is therefore obvious.

PART VII.—SCHEDULES AND FORMS.

CHAPTER XXXVIII.

BROKERS' RULES. SCHEDULES OF FEES, CHARGES AND COMMISSIONS.

Form 1.—Schedule of Charges and Commissions. New York City.¹

.....
(a) REGULATIONS AS TO PRIVATE SALES.

The following commissions shall be chargeable on private sales, except where a special contract has been previously made:

For selling real estate within the limits of New York and Brooklyn	1 %
Leaseholds	2 %
For selling real estate in the suburbs of New York, Brooklyn, and country property.....	2½ %
Western and Southern lands.....	5 %
Selling leases and leaseholds in the suburbs of New York....	5 %
Procuring loans, 1% or by agreement.	

In the case of exchanges, a full commission shall be paid on each side. No sales shall be made for a commission of less than \$25.

Should the title of property prove imperfect, whereby a sale cannot be consummated, the claim for commission shall not be invalidated thereby.

Brokerage shall be deemed to be earned when the price and terms are arranged between buyer and seller, the minds of both parties having fully met. It shall be due and payable when the contract is signed.

(b) REGULATIONS AS TO AGENTS AND MANAGEMENT OF PROPERTY.

The following commissions shall be charged for the management and letting of property, except where a special contract has been previously made:

Renting for a term under 3 years on first year's rental, or fraction thereof	2½ %
Leasing for a term of three years and upward on gross rental, except by special agreement.....	1 %
Leasing country property, first year.....	5 %
Each subsequent year, to same party.....	2½ %
On renting and collecting, except by special agreement.....	5 %

(c) APPRAISEMENT CHARGES.

For appraising real estate in the Boroughs of Manhattan, Bronx and Brooklyn, from \$10 to ¼ of 1% upon valuation, or according to agreement. Suburban property, ½ of 1%, or according to agreement.

.....
¹ These rates are given on page 15 of the diary (1909) published by the Real Estate Board of Brokers of the City of New York. See page 28 thereof as to fees for appraisals. For commissions on auction sales see pages 34, 35, same book.

Form 2.—Schedule of Salesroom Fees and Commissions at Auctions. New York City.¹

(a) REGULAR SALESROOM FEES.

Knockdowns on all real estate.....	\$ 5
Auctioneers not renting stands to pay double rate.....	\$10

(b) LEGAL SALES FEES.

Knockdowns on all sales of real estate by order of the court. \$ 2

Salesroom fees on property offered at upset prices shall be the same as if sold. In all cases where property is offered at an upset price and not sold, or where the property is bid in by the owner, or on his behalf, the auctioneer shall so inform the manager immediately after the sale.

(c) COMMISSIONS ON AUCTION SALES.

Commissions on sales of real estate shall be as follows, viz: On New York and Brooklyn property, not less than $\frac{1}{2}$ of 1%, to be paid by the seller, in addition to the expense of maps, advertising and salesroom fees; and no member of the association shall be allowed to divide this commission with any person except a real estate broker bringing a sale direct.

On country property and leasehold property, wherever situated, the commission shall be not less than 1%, to be paid by the seller, in addition to the expense of maps, advertising and salesroom fees.

The purchaser shall also pay the auctioneer's fee of \$20 on each numbered lot, except on sales of property producing less than \$1,000, when the fee shall not be less than \$10 on each lot.

All legal sales shall be at the legal rate, viz: \$15 auction fee and \$2 salesroom fee, to be paid by the purchaser.

The auctioneer shall be entitled to his commission on any real estate advertised by him and sold by the owner previous to the day of sale, the same as if sold at auction.

Form 3.—Schedule of Fees, Charges and Commissions. Brooklyn, New York.²

(a) APPRAISALS.

Lots 25 x 100 feet or less, plot of one to 3 lots.....	\$15
Each additional lot up to 10 lots, additional	\$ 5
Over 10 lots, by special arrangement.	
Private Houses, 25 x 100 feet or less.....	\$15
Each additional lot or fraction thereof, additional.....	\$ 5
Tenements and Flats, 25 x 100 feet or less.....	\$20
Each additional lot or fraction thereof, additional.....	\$10
Elevator Apartments, 25 x 100 feet.....	\$25
Each additional lot or fraction thereof.....	\$10
Loft Buildings, Factories, Stables, 25 x 100 feet.....	\$25
Each additional lot or fraction thereof, additional.....	\$10
Office Buildings, Hotels, Apartment Hotels, Business Buildings, rate by special arrangement.	

¹ The fees and commissions given in this schedule for auctioning real estate are those adopted by the Real Estate Auctioneers' Association of the City of New York.

² The rates given in this schedule are those adopted by the Brooklyn Board of Real Estate Brokers.

(b) SALES.

City Property within old limits, on price obtained.....	1 %
No commission of less than \$100 to be charged unless specially agreed upon.	
City Property outside limits of old city lines (or as may be agreed upon)	2½ %
Country Property (or as may be agreed upon)	2½ %

(c) LEASES.

One year	2½ %
One to five years on the first year's rent.....	2½ %
Each additional year	1 %
Country Property, one year (or as may be agreed upon for term leases)	5 %

Form 4.—Schedule of Salesroom Fees and Commissions at Auctions. Brooklyn, New York.¹

(a) EXCHANGE FEES.

Knockdown on real estate; to auctioneers renting stands...	\$ 2
Knockdown on real estate; to auctioneers not renting stands.	\$ 6
Knockdown on all sales of real estate by order of the court..	\$ 2
Auctioneers' stands terms per annum, from May 1, payable in advance quarterly.....	\$100

(b) COMMISSION ON AUCTION SALES.

The commission on auction sales of real estate shall be as follows, viz.: On New York and Brooklyn property, ½ of 1%, and on country property, 1%, to be paid by the seller, in addition to the expense of maps, advertising, and salesroom fees. The purchaser shall also pay the auctioneer's fee of not less than \$15, except on sales of property producing less than \$1,000, when the fee shall not be less than \$10 on each lot. All legal sales shall be at the legal rates, viz: \$15 auction fee and \$2 salesroom fees, to be paid by the purchaser.

Form 5.—Rental and Management Charges. Chicago, Illinois.²

(a) BY-LAWS. SECTION I.

For negotiating leases for business and residence property where rents are not collected by the agent, and where buildings are already erected, but not including ground leases.

RULE 1. WHERE TERM IS SIX MONTHS OR LESS. Where the term of the lease is six (6) months or less, charge seven per cent. (7%) on an amount equal to six (6) months' rental. (See Rule 3.)

¹ The fees and commissions given in this schedule are those adopted by the Brooklyn Real Estate Exchange.

² The fees, charges and commissions of Forms 5-8 are taken from Article XII of the By-laws of the Chicago Real Estate Board, Sections I-VII, as revised to 1910.

RULE 2. WHERE TERM IS MORE THAN SIX MONTHS AND DOES NOT EXCEED TWO YEARS. Where the term is more than six (6) months and does not exceed two (2) years, charge five per cent. (5%) on an amount equal to one year's rental. (See Rule 3.)

RULE 3. IF MONTHLY RENTALS ARE NOT UNIFORM. If the monthly rentals are not uniform throughout the entire term of any lease coming under the provisions of Rules 1 and 2, the average monthly rental for the actual period of the lease shall be used as the basis for computation.

RULE 4. WHERE TERM EXCEEDS TWO YEARS. Where a term exceeds two (2) years use as a basis charge, five per cent. (5%) and add for each six (6) months or fraction thereof over two (2) years, one-half ($\frac{1}{2}$) of one per cent. (1%), which rate shall be figured on one (1) average year's rental of the entire term.

RULE 5. WHAT TO CHARGE IF LEASE CALLS FOR A NET RENTAL. In figuring commissions to be charged on leases where the rental to be received by the Lessor is net, that is to say, where the Lessee agrees to pay taxes and fire insurance premiums, in addition to the rental named in the lease, the annual rental upon which to compute commissions shall be the net rental plus the amount of the annual taxes and estimated fire insurance premiums; the intention being to make the charge on the same basis as if the Lessor paid same and made the lease on the usual gross basis.

HOW TO ESTIMATE TAXES AND INSURANCE PREMIUMS WHERE LEASE CALLS FOR NET RENTAL. As it will be impossible to correctly judge what the future taxes and insurance premiums will be during the term of a lease, the amount of the taxes last paid, or to be paid (if possible of being ascertained) on the property, shall be used as a basis for computation. As such leases obviously state the amount of fire insurance to be carried on the property at the expense of the Lessee, and an approximate insurance rate, contemplating the tenant in possession, can easily be obtained from the Underwriters as to the insurance rate at the time the lease is made, the same shall be used as a basis for computation.

RULE 6. WHEN LEASE CONTAINS PRIVILEGE OF RENEWAL. When the lease gives the Lessee a privilege of renewal, the charge shall be made for the actual term of the lease. If the Lessee later avails himself of the privilege of renewal, whether strictly according to the terms expressed in the lease or not, the agent shall also be entitled to a commission on the extended period. This additional commission shall be the difference between the amount of commission due for the entire term, including the extended period, and the amount of commission previously paid. The additional commission shall be paid the agent at the time of renewal.

RULE 7. WHERE RENEWAL OF LEASE IS NEGOTIATED BY AGENT. Where renewals of leases are negotiated and the agent does not collect the rent, he shall charge the regular rates prescribed in this Section, the same as if the leases were negotiated with new tenants.

RULE 8. MINIMUM CHARGE FOR LEASING RESIDENCE PROPERTY. The minimum charge to be made in any case for leasing residence property shall be Ten Dollars (\$10).

RULE 9. WHERE LEASE CONTAINS OPTION TO PURCHASE. Should there be a clause in the lease giving the Lessee an option to purchase the property demised, whether or not the purchase is made exactly on the terms stipulated in the lease, the owner shall pay the agent who negotiated the lease two and one-half per cent. ($2\frac{1}{2}\%$) on the purchase price, to be paid when the sale is closed. (See Rule 35.)

(b) BY-LAWS. SECTION II.

Charges for negotiating leases which contemplate the erection of new buildings.

RULE 10. WHERE LEASE CONTEMPLATES ERECTION OF NEW BUILDING. The charge for negotiating leases which contemplate the erection of a building for a tenant, shall be two and one-half per cent. (2½%) on the value of the land as calculated in the making of the lease, and two and one-half per cent. (2½%) on the cost of the proposed building and appurtenances.

Charges for procuring tenants under the conditions mentioned in the foregoing Sections 1 and 2 are to be made at the rates stipulated, unless there shall have been a previous agreement between the owner and the agent for the collection of rent.

(c) BY-LAWS. SECTION III.

Charges for management of property where agent collects the rent, makes leases, repairs, etc.

RULE 11. CHARGES FOR STORE, LOFT, OFFICE, RESIDENCE OR OTHER PROPERTY. For renting and collecting rents regardless of the character, use or location of the property, charge five per cent. (5%) on collections, unless special or extraordinary services are required, when an additional charge may be made which will be commensurate with the service rendered.

RULE 12. For office and residence property, wherever located, charge five per cent. (5%) on collections.

RULE 13. CHARGE ON DISBURSEMENTS. In the management of property under this Section the agent shall be entitled to charge on disbursements as follows, to wit: On amounts paid out for taxes on improved property, one per cent. (1%) and on unimproved property two and one-half per cent. (2½%), no charge to be less than One Dollar (\$1). Members shall have the right to charge for special services not contemplated under ordinary agency.

RULE 14. For negotiating new leases and for the renewals of old leases the charge shall be in accordance with the circumstances and services performed, and shall be in addition to the amount expended for advertising.

RULE 15. WHEN COLLECTION OF RENTS IS WITHDRAWN. Where the collection of rents on property is withdrawn from an agent, such agent shall be entitled to charge for the unexpired term of any leases he may have made or renewed during his agency, at the rates specified in Section 1 hereof.

RULE 16. AGENTS MAY TAKE MANAGEMENT ON OTHER BASIS. Agents may take the management of buildings and charge the regular Board rates for making new leases as prescribed in Sections 1 and 2 hereof, and in their discretion reduce the charge hereinbefore provided in this Section for renting and collecting. This policy is recommended to members for the reason that it places them in position to pay commissions to other brokers who may assist them in making leases.

RULE 17. FOR THE TRANSFER OR ASSIGNMENT OF LEASES. For transferring or assigning leases the charge shall be in proportion to the service rendered, but in no event shall same be less than Five Dollars (\$5) for leases on residence property and Fifteen Dollars (\$15) for leases on business property.

.....

Form 6.—Charges for Ground Leases. Chicago, Illinois.**BY-LAWS. SECTION IV.**

The following charges shall be made for ground leases, whether the agent is managing and collecting rents on the property at the time of making lease or not.

RULE 18. WHERE THE TERM IS SEVEN YEARS OR LESS. For making an original lease, or a sub-lease thereof, where the term of lease is seven (7) years or less, charge in accordance with Section 1 of this Article.

RULE 19. WHERE THE TERM IS OVER 7 AND DOES NOT EXCEED 15 YEARS. For making an original lease, or a sub-lease thereof, where the term of lease is over seven (7) and does not exceed fifteen (15) years, charge on the total rent for the term two per cent. (2%).

RULE 20. WHERE TERM EXCEEDS 15 YEARS. For making an original lease, or a sub-lease thereof, where the term of lease exceeds fifteen (15) years, charge on the value of the ground as determined by capitalizing the annual ground rental on a four per cent. (4%) basis, two and one-half per cent. (2½%).

PROVISION (A) OF RULE 20. IF ANNUAL GROUND RENT IS NOT UNIFORM. If the annual ground rental during the entire term of the lease is not uniform, the charge shall be made on the value of the land as determined by the average annual ground rental capitalized as aforesaid.

PROVISION (B) OF RULE 20. IF LEASE CONTAINS PROVISION FOR REAPPRAISEMENT. If the lease contains a clause providing for reappraisal of the ground by appraisers during the term of the lease, the average annual rental between the date of lease and the date set for the first appraisal shall be taken as the basis on which to compute the total rental for the entire term.

RULE 21. IF OTHER CONSIDERATION IS PAID BY LESSEE IN ADDITION TO RENT. In any case, if cash or other consideration is paid in addition to the ground rent, the amount of such cash, or value of such consideration, shall be added to and become a part of the capitalized value on which the charge shall be figured.

Form 7.—Commissions on Sales. Chicago, Illinois.**BY-LAWS. SECTION V.**

Charges for making sales of Real Estate.

RULE 22. On a sale of \$2,000 or less, 5%, but no charge shall be less than \$25.

RULE 23. On a sale over \$2,000 up to and including \$3,000.....\$120

RULE 24. On a sale over \$3,000 up to and including \$4,000..... 140

RULE 25. On a sale over \$4,000 up to and including \$5,000..... 160

RULE 26. On a sale over \$5,000 up to and including \$6,000..... 180

RULE 27. On a sale over \$6,000 up to and including \$7,000..... 200

RULE 28. On a sale over \$7,000 up to and including \$8,000..... 220

RULE 29. On a sale over \$8,000 up to and including \$9,000..... 240

RULE 30. On a sale over \$9,000 up to and including \$10,000..... 250

RULE 31. On a sale exceeding \$10,000.....2½%

The above schedule does not apply to the handling of subdivisions where the charge shall be a matter of contract.

RULE 32. SELLING ACRE AND FARM PROPERTY. In selling or exchanging acre property, outside of Cook County, or farm lands located in said County, the charge shall be five per cent. (5%).

RULE 33. SELLING LEASEHOLDS. For selling Leaseholds of buildings, or parts thereof, charge for the unexpired term of the lease the same rates as are provided in Section I¹, as if a new lease were made, plus 20 per cent. of the bonus.

For selling Ground Leases and Improvements, charge 4 per cent. on the amount of the sale price of the leasehold interest and improvements, plus 1½ per cent. on the value of the ground as determined by capitalizing on a 4 per cent. basis the annual ground rental being paid at the time of sale.

RULE 34. EXCHANGES. In case of exchanges of property, a full commission, based upon the sale price, shall be paid by each party, the same as if a sale of each property had been made.

RULE 35. WHAT SHALL CONSTITUTE SALE PRICE. All charges herein provided for the sale or exchange of real estate and the sale of leaseholds and buildings, shall be based upon the sale price, meaning thereby that if the sale is made subject to a mortgage or mortgages the sale price shall be construed to mean the price of the equity, plus the encumbrances.

.....

Form 8.—Loan Charges and Valuation Fees. Chicago, Illinois.

.....

(a) BY-LAWS. SECTION VI.

RULE 36. REAL ESTATE LOANS. On Real Estate Loans the mortgagor shall pay two and one-half per cent. (2½%) on the amount of the loan, and in addition thereto the attorney's fees for the examination of title, Recorder's fees for recording the necessary loan papers, and the cost of Guaranty Policy, and of continuation of the Abstract of Title brought down to include the record of the deed securing the loan.

RULE 37. RENEWAL OF LOANS. For renewal of loans the mortgagor shall pay at the same rate as provided in the preceding paragraph of this Section.

(b) BY-LAWS. SECTION VII.

For making valuations on real estate, members shall not charge less than the following amounts:

On amounts not exceeding \$10,000, charge \$25.

On amounts over \$10,000 and not exceeding \$30,000, charge \$25 on the first \$10,000 and \$2 per thousand on excess, up to and including \$30,000.

On all amounts over \$30,000 and not exceeding \$200,000, \$1 per thousand on excess over \$30,000 with a further charge of 75 cents per thousand on amounts over \$200,000.

The above are the minimum fees to be charged for ordinary valuation services, but where a member is called upon to make a special valuation he shall charge according to the service rendered.

.....

¹ See Form 5 *supra*.

Form 9.—Brokers' Rules, Fees, Charges and Commissions. Cook County, Illinois.¹

RULES AND REGULATIONS.

The members of the Cook County Real Estate Board are requested not to advertise or offer to sell or loan money on real estate without commission.

All applicants for Active Membership in the Cook County Real Estate Board shall be regular licensed brokers.

No member shall solicit business from owners represented by other members of the Cook County Real Estate Board, by offering less than Real Estate Board rates of commission, rebates or other money inducements.

It is the duty of a member having a purchaser or applicant for the purchase, lease or loan of premises represented by another member under authorization of the owner, to communicate with such member whose agency is known or ascertained while negotiations are in progress, and negotiate the sale, lease or loan through such agent member, and the duty is reciprocal on the part of the member having the agency of the property to negotiate with a member bringing a purchaser or applicant for lease or loan, and in either case to make satisfactory arrangements for division of commissions.

The following resolution was passed by the members of the Cook County Real Estate Board at their meeting held November 10, 1908:

“RESOLVED: That it is the sense of the Cook County Real Estate Board that the best results in selling Chicago real estate are obtained by placing the sale exclusively with one broker, and the Members of this Board stand pledged to render each other active assistance in selling property listed exclusively with any member of this Board.”

SCHEDULE OF COMMISSIONS AND CHARGES.

(a) COMMISSIONS FOR MAKING SALES OF REAL ESTATE IN COOK COUNTY, ILL.

- (1) On a sale of \$500 or less, \$25.
- (2) On a sale of \$500 to \$2,000, 5% of sale price.
- (3) On a sale

Over \$2,000 up to and including \$ 3,000.....	\$120
Over \$3,000 up to and including \$ 4,000.....	\$140
Over \$4,000 up to and including \$ 5,000.....	\$160
Over \$5,000 up to and including \$ 6,000.....	\$180
Over \$6,000 up to and including \$ 7,000.....	\$200
Over \$7,000 up to and including \$ 8,000.....	\$220
Over \$8,000 up to and including \$ 9,000.....	\$240
Over \$9,000 up to and including \$10,000.....	\$250

- (4) On a sale exceeding \$10,000, 2½%.

The commission charged shall be upon the total sale price, and not upon the owner's equity.

(5) SUBDIVISION. On the sale and management of subdivision property, where the owner does the advertising and pays such general expenses as may be necessary for placing the property upon the market, the charge for selling lots shall be not less than 5%. Where the collections of the

¹ These rules, schedules of commissions and charges for handling real estate were adopted by the Cook County (Illinois) Real Estate Board, October 12, 1909.

contracts are left with the agent, a collection fee of not less than 3% shall be charged.

(6) **LANDS.** For selling land or other real estate located outside of Cook County, not less than 5%.

(b) **NET PRICES.**

When an owner agrees with an agent in writing to offer property for sale at a price net of commissions to the broker, it is understood that all sums secured over and above said price by or through said broker during the time that said price is given, shall be paid over to said agent as payment in full for commissions and services rendered.

(c) **EXCHANGES.**

(1) In the case of exchanges of property, a full commission shall be paid by each party, based upon the consideration for the respective pieces of property so exchanged, the same as if a sale had been made, in accordance with the rates established herein.

(2) Exchanging lands or other real estate located outside of Cook County, not less than 5%.

(d) **LEASEHOLDS.**

(1) **SELLING OR LOANS.** The commission for selling leaseholds or making loans on leaseholds shall be 1½% in addition to the present rate established for the sale of or loans on real estate in Cook County.

(2) **EXCHANGING.** For exchanges of leaseholds in or out of Cook County, 5%.

(e) **FEES FOR VALUATION.**

On all amounts up to \$15,000, \$25.

On amounts from \$15,000 to \$100,000 the fee shall be \$25 on the first \$15,000, and \$1 per thousand on excess up to \$100,000, with a further charge of fifty cents per thousand on amounts over \$100,000.

(f) **PLACE OF CLOSING SALE.**

All sales shall be closed at the office of the agent representing the owner of the property.

(g) **MANAGEMENT AND COLLECTION OF RENTS.**

(1) For negotiating and making leases or for the renewal of old leases, in addition to the amount expended for advertising, the charge shall be in accordance with the circumstances and service performed, the minimum charge to be \$3.

The owner is to pay for all advertising connected with renting the property.

(2) For renting and collecting on buildings used as stores and lofts when occupied by one tenant, and the rents exceed \$1,000 per annum, not less than 2½%.

(3) Where annual rental is less than \$1,000, 5%.

(4) When occupied by more than one tenant, 5%.

(5) Office and residence property, 5%.

(6) Commissions are to be charged on the total rents collected.

(7) It is understood that when the collection of rents on property is not left with the agent for a full year, he shall be entitled to charge for any lease he may have made or renewed, at the rate specified herein "for negotiating and making leases where rents are not collected by agent."

(h) **FOR DISBURSEMENTS.**

(1) In the management of property the agent shall be paid on disbursement for janitor service, coal, repairs and all expenses (except insur-

ance, taxes and interest) $2\frac{1}{2}\%$. The above charge shall not be made when an agent is receiving 5% for collection of rents.

(i) FOR PAYMENT OF TAXES.

(1) On unimproved property, on amount of taxes paid, $2\frac{1}{2}\%$. On improved property, on amount paid, 1%. No charge to be made less than \$1.

For preparing affidavits, drawing leases, deeds or other documents, a charge of not less than \$3 shall be made.

(j) FOR NEGOTIATING AND MAKING LEASES WHEN RENTS ARE NOT COLLECTED BY AGENT.

(1) Stores, business, residence and flat property, lease not exceeding one year, charge on amount of the yearly rental of 5%.

(2) Where the term exceeds one year, add to the foregoing 1% of the rental for each additional year.

(3) Where the term is less than twelve months and more than six months, charge the same as if the lease had been made for one year. Where the term is six months or less, charge 5% on an amount equal to six months' rental at the rate at which the lease is made.

(4) The minimum charge to be made in any case for leasing stores, residence or flat property, \$10.

(k) GROUND LEASES.

(5) Ground lease, term of fifteen years or less, on total rent covered by lease, $2\frac{1}{2}\%$.

Where property is subject to re-appraisal during the life of lease, the charge is to be computed for the full term, on basis of the average rental for the first five years.

(6) Ground leases exceeding fifteen years, on the appraised value of property, at date of making lease, $2\frac{1}{2}\%$. If more than one appraisal, or if an agreed increase of rents at stated periods without appraisal is mentioned in the lease, then said increase is to be treated as a revaluation of the property, and the percentage is to be figured on an average of said appraised value.

(7) Should there be a clause in the lease giving the lessee an option to purchase the property, and he should avail himself of said option, the owner is to pay the agent $2\frac{1}{2}\%$ on the purchase price paid, when sale is closed.

(8) Where the tenant has privilege for "renewal" expressed in lease, it is to be understood that the owner of property shall pay the agent making such lease a commission for said renewal at the same rate as though it was a new lease. This commission is to be paid at the time of the renewal.

(9) Where owner erects building: The rate of commission for negotiating leases where owner erects building or buildings, for a tenant, shall be $2\frac{1}{2}\%$ on the value of the land, and $2\frac{1}{2}\%$ on the cost of the improvement. Charges for procuring tenants are to be made at the foregoing rates, unless there shall have been a previous agreement with the agent that he shall collect the rent.

(l) TRANSFERRING LEASES.

For the transferring of leases on any premises, from one tenant subletting to another, a rate of $2\frac{1}{2}\%$ of the total balance due on such unexpired lease shall be charged to the tenant subletting, with a minimum charge of \$3.

(m) REAL ESTATE LOANS.

(1) On loans of \$1,000 or more on improved store, flat or residence property, not less than $2\frac{1}{2}\%$ on amount of loan, and in addition thereto, attorney's fees for examination of title, fees for extra services rendered by attorney or broker in matter of completing loan; recorder's fee for re-

ording the necessary documents, and the cost of a complete abstract of title brought down to include the deed securing the loan, or a guarantee policy in lieu of abstract continuation.

(2) On loans below \$1,000 on improved store, flat or residence property, from 2½% to 5% on amount of loan; the minimum commission to be \$15.

(3) On loans on unimproved property, 5% on amount of loan; the minimum commission to be \$20.

(4) On building loans of \$1,000 or more, 2½% to 3½% on amount of loan, and a reasonable fee for extra service.

(5) On building loans below \$1,000, 3% to 5% and a reasonable fee for extra service; the minimum commission to be \$25.

(6) On loans outside of Cook County, or outside of the State of Illinois, 5% on amounts of \$1,000 or more, and from 5% to 7% on amounts below \$1,000; the minimum commission to be \$25.

(7) On loans on theatres, churches, factories, livery stables, storage and warehouses and other properties, not specifically classified, from 2½% to 5%.

(8) The commission for renewals of all loans shall be at the same rate as when loan was originally made.

(9) The rate of discount for purchase of real estate mortgage paper to be the same as the rate established for making new loans.

(10) Commission to brokers placing loans with other brokers in no case over 1% on amount of loan.

(n) BUYER'S AGENT.

Where a broker is employed to purchase real estate, he shall receive from the party so employing him the same commission on the amount of the purchase as though he were employed by the seller in the sale of said premises.

Where an agent represents a tenant or lessee for the purpose of leasing any premises, he shall be entitled to the same commission or charges from said tenant or lessee as though he represented the owner or lessor in the leasing of said premises.

(o) AUCTION SALES.

For the sale of real estate at auction, the same commissions shall be charged as herein provided for the making of sales of real estate in or outside of Cook County, and in addition thereto the owner to pay all expenses of advertising and conducting the auction sale. Commission fee to be paid on all property at the time of sale.

When property is advertised for sale at auction and is sold by the owner previous to the day of sale, or thirty days thereafter, the agent shall nevertheless be entitled to his commission.

(p) EXPERT TESTIMONY.

A minimum fee of \$25 shall be charged. For attendance at court, a fee of \$10 to \$100 per day shall be charged, payable in advance.

(q) SALESMEN.

Any member of the Cook County Real Estate Board employing a salesman, shall request a reference from the former employer.

When a salesman is under contract or indebted to any other member of the Cook County Real Estate Board, such salesman shall not be accepted or employed until an offer has been made by him to adjust his differences to the satisfaction of said other member.

It is understood that where a salesman is employed on "a commission basis" that all sums advanced to said salesman shall be charged against all commissions that may be earned by him, and in the event of his resignation

or discharge, all such sums charged to him shall immediately become due and payable.

Where a salesman is employed on "a guarantee basis" and has failed to earn a sum sufficient to pay the amount paid to him, in the event of his resignation or discharge, all such sums paid to said salesman shall be considered as salary for services.

When two or more salesmen are employed upon any one particular deal, the commission shall be credited as follows:

Salesman representing the purchaser shall be credited with an interest in 50% of the total commission.

Salesman representing the seller shall be credited with an interest in 50% of the total commission.

Where a salesman is employed on a commission basis, he should be allowed a listing fee for all property listed by him, in the event that same is sold within six months from date of listing by said salesman, through the office he is connected with (with the understanding that his information and particulars were of use in effecting a sale).

Such listing fee shall be not more than 5% of the sale commission received. 10% of the sale commission received should be allowed if property is listed exclusively and the sale is made through the office he is connected with. Sale to be made during the term of exclusive agency.

The 5% and 10% credit, however, to be allowed and earned only in the event that the salesman does not effect the sale nor benefits in any other way in sale commissions.

When a salesman resigns or is discharged by the office he has been associated with, all previous or pending business shall remain the property of said office.

(r) FORMS OF CONTRACTS, ETC.

Forms of contracts and other approved papers shall be prepared under the direction of the Directors, and be offered for sale to all members, who will be requested to use the same in conducting their business.¹

(s) DEPOSITS, EARNEST MONEY AND ESCROWS.

On the sale or lease of real estate a deposit of 5% to 10% of the consideration shall be deposited by the purchaser at the time of signing and delivering of the contract, and same shall be held in escrow by the agent representing the owner. In case a deposit is forfeited by the purchaser the whole thereof, except the commission of the agent negotiating the sale or lease, together with the expense connected therewith, shall belong to and be paid over to the owner of the property.

In the event that the earnest money in contract is deposited with other than the agent representing the owner, all charges for making said escrow shall be paid for by the party requesting the escrow.

(t) DIVISIONS OF COMMISSIONS.

When two brokers are interested in a sale, the commission shall be divided as follows:

50% to the broker representing the purchaser.

50% to the broker representing the seller.

When two brokers are interested in an Exchange, the Commission shall be divided as follows:

Each broker to receive 50% of the total commission received from both sides of the exchange.

When two or more brokers are interested in one end of a sale or Exchange, the brokers representing that end shall divide 50% of the Commission received between such two or more brokers.

¹ See Forms 18, 37 *infra*.

Form 10.—Schedule of Fees, Charges and Commissions. Philadelphia, Pa.¹

(a) COMMISSIONS ON SALES.

Improved property in the City of Philadelphia.....	1%
Unimproved property.....	2%

(b) MORTGAGES.

Obtaining first mortgages.....	1%
Obtaining second mortgages, amounts fixed by agreement.	

(c) APPRAISALS.

The fees for appraising property are generally a matter of agreement between the parties, or if it is a matter which concerns the Court, the fee is fixed by the Judge.

Form 11.—Schedule of Fees, Charges and Commissions. St. Louis, Missouri.²

(a) COMMISSIONS AND CHARGES.

In the absence of an agreement to the contrary between the parties concerned, the following schedule of commissions and charges shall obtain with respect to all transactions between members made upon the floor of the Exchange.

SEC. 1. On private purchases and sales of real estate, where the amount involved is \$1,000 or less, \$25; where the amount exceeds \$1,000, 2½ per cent.

SEC. 2. On auction sales the seller to pay 2½ per cent. and in addition thereto all expenses of conducting the sale, except the auctioneer's fee. Commissions to be paid on all property knocked down at the sale. Where property is bought by an agent at auction sale for a client, \$10 where amount involved is \$2,000 or less; ½ per cent. where amount involved is over \$2,000 and under \$10,000, and ¼ of 1 per cent. where amount involved exceeds \$10,000.

(b) LOANS.

SEC. 3. On all loans of \$1,000 or less, a commission of \$25 shall be paid by the borrower, and on all loans of more than \$1,000, 2½ per cent. If an agent shall make an application for a loan which shall be accepted, the borrower shall be liable for the foregoing commissions whether he shall in fact accept the loan or not.

(c) LEASEHOLDS.

SEC. 4. On a leasehold from thirty to ninety-nine years, 2½ per cent. on valuation of property; from twenty to thirty years, 2 per cent.; from ten to twenty years, 1½ per cent.; from one to ten years, 1 per cent. of gross rental; on annual leases for \$2,500 per annum or less, \$25. The value of a leasehold is to be determined by capitalizing the annual rental upon a basis of 4½ per cent.

¹ This information is supplied by Mr. Frederick M. Pile, a member of the Board of Directors of the Philadelphia Real Estate Brokers' Association.

² From Article VI of the By-laws of the St. Louis Real Estate Exchange.

(d) COLLECTION OF RENTS.

SEC. 5. Where monthly rent of one tenant is less than \$100, 5 per cent.; if in excess of \$100, 3 per cent.

(e) APPRAISEMENT.

SEC. 6. Where property appraised at \$1,000 or less, \$10; if over \$1,000 and less than \$10,000, 1 per cent., and $\frac{1}{2}$ per cent. on every additional \$1,000 up to \$100,000; and $\frac{1}{4}$ of 1 per cent. on every thousand in excess of \$100,000.

Form 12.—Rules and Regulations of the St. Louis Real Estate Exchange.

(a) AUCTION ROOM FEES—ORDINARY SALES—CHARGES FOR USE OF AUCTION ROOM.

Second.—Knockdown on real estate, when the aggregate amount is less than \$5,000, \$5.

Between the sums of \$5,000 and \$20,000, \$10.

All above \$20,000, 50 cents for each \$1,000 in excess.

Commissions on sales of real estate at auction in this Exchange shall be the same as adopted in the by-laws. When property is advertised for sale at auction and is sold by the owner previous to the day of sale, the agent shall nevertheless be entitled to his commission.

(b) JUDICIAL SALES.

Fourth.—All judicial, sheriff and trustee's sales may be held on the floor of the Exchange *free of charge*, and in such instances the same facilities for selling and posting notices shall be accorded to non-members as to members.

(c) AUCTION SALES.

Fifth.—No auctioneer shall raise a bid, and he shall not countenance any fictitious bidding, or by-bidding, or any practice calculated to deceive bidders at auction sales, or to impose a fictitious value on property offered for sale.

Sixth.—Any auctioneer violating the above rule, and the persons representing him, shall be liable to expulsion or suspension of privileges.

Seventh.—When property is offered at auction under special conditions, announcement of the same must be made before the sale by the agent or auctioneer.

Form 13.—Schedule of Fees, Charges and Commissions. Boston, Massachusetts.¹

(a) SALE OR PURCHASE.

Boston Proper—\$10,000 or less.....	2½%
Over \$10,000 and up to \$30,000, 2½% on	

¹ Schedule of rates adopted April 14, 1890 by the Board of Directors of the Real Estate Exchange and Auction Board (Boston), as amended March 14, 1892; March 9, 1903; October 8, 1906, and March 20, 1907. These rules prevail in the absence of special agreement.

\$10,000 and $\frac{1}{4}$ of 1% on each \$1,000 and fraction thereof exceeding \$10,000.	
\$30,000 or over.....	1 %
Suburbs (See Note).....	2½ %
Elsewhere, the customary local charges.	

(b) EXCHANGES.

Commissions, as above, paid by both parties.

(c) MORTGAGES.

Boston Proper—\$10,000 or less.....	2 %
Over \$10,000 and up to \$30,000, 2% on \$10,000 and $\frac{1}{2}$ of 1% on each \$1,000 and fraction thereof exceeding \$10,000.	
\$30,000 or over.....	1 %
Suburbs (See Note).....	2 %
Second Mortgages.....	2 %

(Note) SUBURBS include South and East Boston, Charlestown, Roxbury, West Roxbury, Brighton, and Dorchester.

BOSTON AND ROXBURY LINES.—The southerly lines of estates abutting on the southerly side of Massachusetts avenue from the Roxbury canal to the Providence railroad location and of Ruggles street and the Fenway from said railroad location to Brookline avenue, thence across the Riverway to the centre line of St. Mary's street.

(d) LEASES.

Under three years, on amount of first year's rent.....	2½ %
Three years, or over, on gross amount of rent.....	1 %

(e) EXTENSIONS OF LEASES.

For extensions of leases provided for in original instruments, if availed of by original lessees or their assigns, full leasing commissions to brokers negotiating such original instruments, payable upon effect of such extensions by such lessees; provided that the total commissions paid for original leases and extensions shall not exceed in amount a commission chargeable for the entire term covered by the original lease and its extensions.

(f) RENEWALS OF LEASES.

To brokers negotiating original leases and employed for renewals, without increase of rental over that named in the original leases, one-half the regular leasing commissions payable upon such renewals; when rental is increased, full leasing commissions.

(g) SALES UNDER OPTIONS.

To the broker negotiating a lease containing an option of sale, if option is availed of, full commissions for both lease and sale, but not to exceed in amount the commissions chargeable upon the total amount received by the owner from both sale and lease.

(h) CARE AND MANAGEMENT OF ESTATES.

On amount of rent collected.....	5 %
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(i) MINIMUM CHARGE.

For sale, mortgage or lease.....	\$25
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**Form 14.—Commission Rate Schedule. Jersey City,
New Jersey.¹**

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The following Commission Rates and Conditions will govern until written notice of change is promulgated by the Association.

- (a) FOR THE RENTING AND COLLECTING OF RENTS OF PROPERTY OF INDIVIDUALS, ESTATES, ETC., with sole charge upon the distinct understanding that the engagement is made by the year, and for a term of not less than one year 5 %
and that in case of change of management before the year ends, full commission is to be paid on the advance rents for the balance of year on all agreements, if by month or year, and on unexpired leases a rental commission is to be paid to their expiration at the schedule rates.
Special Agreements may be made to collect rents on leases, if same have been made independent of member's office.

- (b) FOR LOOKING AFTER REPAIRS, TAXES, WATER RENTS, INSURANCE, INTEREST, ETC., and for the payment of the same, special rates may be made.

- (c) FOR RENTING OR LEASING Dwellings, Business and other City property, when rented for one year or less, and the annual rent is under \$300..... \$7.50
When rented for less or more than one year, and not exceeding five years, and the annual rent is \$300 or over, on the year or term rent..... 2½ %
When rented for a term exceeding five years, on the gross rent for the exceeding term..... 1½ %
If there is a hold over, a renewal, or privilege given for renewal or renewals, and the option is taken, on the gross rent for the term or terms..... 1½ %
Country Property on like conditions..... 5 %

Commissions Payable by the landlord when the agreement is complete or lease is executed.

If Members' Bill Is Put Up, one-half commission will invariably be charged if the premises are hired by the occupant.

One-Half the above rates will in all cases be charged if the premises are rented by the owner, or by any other agent or broker, unless by special agreement otherwise.

No Charge Made for Drawing Ordinary Leases.

There is Objection to Taking Houses or other property to rent that are offered by other agents unless by special arrangements, as much annoyance is avoided to the owner, the occupant and those looking.

Owners having property registered on members' books are requested to notify them at once in case they rent or lease the property themselves, or through other agents or brokers.

Positively no Refusal will be given of any property unless by authority of owner, and no charge is made for registering property, if nothing is done.

For Attendance on Cases in Court, the charge will be a reasonable fee and costs.

¹ Schedule adopted by the Board of Real Estate Brokers of Jersey City and Vicinity, September 29, 1903.

(d) FOR SALES OR EXCHANGES OF CITY PROPERTY, when the purchase money does not amount to \$1,000.....	\$25
When the purchase money amounts to \$1,000 or over, on the gross amount of sale.....	2½%
Water Front and Country Property, on the gross amount of sale	5 %

Laws N. J. Sales, G. S., Page 1604, S. 10:

“No broker or real estate agent, selling or exchanging land for or on account of the owner, shall be entitled to any commission for the sale or exchange of any real estate, unless the authority for selling or exchanging such land is in writing, and signed by the owner or his authorized agent, and the rate of commission on the dollar shall have been stated in such authority.”

In Exchanges of property full commission shall be paid on each side as per schedule.

Commissions Payable by seller when contract is signed; full commissions will be charged seller if sales are made from information obtained through a member's office.

A Defective Title will not invalidate claim for commission.

No Charge is Made for Registering Property for Sale.

Owners having property registered on members' books are requested to notify them at once in case they effect a sale themselves or through other agents or brokers.

- | | |
|--|-------------|
| (e) FOR NEGOTIATING MORTGAGES OR OBTAINING LOANS on City or Country Property, commissions fixed by statute, Search Fees and Expenses additional and per annum.. | ½ of 1% |
| (f) FOR APPRAISAL OF CITY PROPERTY, Lot or House and Lot, at member's office..... | \$5 to \$10 |
| When personal examination is required, and the valuation is under \$4,000, expenses and..... | \$10 |
| When personal examination is required, and the valuation is \$4,000 or over, expenses and..... | ¼ of 1% |
| Country Property on the valuation, expenses and..... | 1% |
| (g) OFFICIAL APPRAISEMENTS by an Appraisal Committee of the Association will be made on request to the Association at their headquarters, and a certificate issued.— | |
| Minimum charge for Committee Appraisal..... | \$25 |
| Minimum charge for Single Member's Appraisal..... | \$10 |
| Appraisal Fees and Expenses are payable in advance, except on personal examinations, then a deposit, and balance on receipt of valuation in writing. | |
| (h) FOR AUCTION SALES OF REAL ESTATE, advertising expenses, adjusted to suit, and on the gross amount of sale | 1 to 2½% |
| (i) OF SECURITIES, advertising expense of \$2 per block, \$3 minimum commission charge, and on the par or over.. | ¼ of 1% |
| (j) OF PERSONAL PROPERTY, advertising expenses (\$5 minimum commission charge), and on the gross amount of sale | 10% |

Form 15.—Schedule of Brokers' Commissions. Denver, Colorado.¹

.....
(a) COMMISSION ON SALES.

5% on first \$2,500; 2½% on the excess.

(b) COMMISSION ON EXCHANGES.

Subject to agreement.

(c) COMMISSION ON LOANS.

In the City of Denver, 2%

Outside the City of Denver, as per agreement.

(d) COMMISSION ON RENTALS AND LEASES.

Stores, business property, residence property and ground leases:

(1) Lease not exceeding five years, charge on amount of total rental, 2%.

Where term exceeds five years, charge 2% for first five years, and 1% for each additional annual rental up to and including a period of twenty-five years. For all time in excess of twenty-five years, ½ of 1%. If annual rental (as in some ground leases) is subject to change through reappraisal at various periods, the commission to be based on average annual rental for first ten years. The same charge to apply on assignment or sale of a lease. All commissions payable on execution or assignment of lease.

A minimum charge to be made in any case for leasing property shall be \$5.

A charge of not less than \$2.50 shall be made for making or checking over inventory of furnished house.

(2) Should there be a clause in the lease giving the lessee an option to purchase the property, and should he avail himself of said option, the owner is to pay the agent commission in full for a real estate sale, provided commission already paid does not equal or exceed amount of the sale commission.

(3) Where a tenant has privilege for "renewal" expressed in lease, it is to be understood that the owner of the property shall pay commission for said rental at the same rate as though the lease, when first written, had covered the whole term. This commission is to be paid at the time of the renewal.

(4) For procuring tenant on "monthly tenancy," 20% of first month's rent. In no case shall the charge be less than \$1.

(5) For leasing of property and collection of rents, a charge of not less than 5% shall be made on all collections. \$1 per month to be the minimum charge to any one property owner.

.....

Form 16.—Schedule of Fees, Charges and Commissions. San Francisco, California.²

.....
(a) TERM LEASE.

2½% of first year's rent, and 1½% of each year's rent thereafter.

(b) MONTHLY LEASE.

10% of first month's rent.

.....

¹ In force under the rule of the Denver Real Estate Exchange on January 1, 1910.

² The San Francisco Real Estate Board states that this is the only schedule of rates adopted by that Board.

CHAPTER XXXIX.

FORMS OF CONTRACTS FOR SALE OF REAL ESTATE.¹

Form 17.—Contract of Sale. New York City.

.....

CONTRACT OF SALE.

AGREEMENT, made and dated October 1st, 1910, between EXECUTIVE REALTY COMPANY, a corporation incorporated under the laws of the State of New York, hereinafter described as the seller, and WILMOT R. WETMORE, of the City of Boston, State of Massachusetts, hereinafter described as the purchaser;

WITNESSETH: That in consideration of the sum of Twenty-five Thousand, Six Hundred Dollars (\$25,600) to be fully paid as hereinafter mentioned, the seller hereby agrees to sell and convey, and the purchaser hereby agrees to purchase, ALL that certain plot, piece or parcel of land, with the buildings and improvements thereon erected, situate, lying and being in the Borough of Manhattan, City, County and State of New York, known as No. 901-903 Grant Avenue, and bounded and described as follows: BEGINNING at a point on the Northerly side of Grant Avenue distant seventy-five (75) feet Easterly from the corner formed by the intersection of the Northerly side of Grant Avenue with the Easterly side of Madison Street, and running thence Northerly, parallel with Madison Street and part of the distance through a party wall, one hundred (100) feet; thence Easterly and parallel with Grant Avenue, fifty (50) feet; thence Southerly and again parallel with Madison Street and part of the distance through another party wall, one hundred (100) feet to the Northerly side of Grant Avenue, and thence Westerly and along the Northerly side of Grant Avenue, fifty (50) feet to the point or place of beginning;

TOGETHER with all the right, title and interest of the seller of, in and to the street or avenue in front of and adjacent to said premises to the centre line thereof;

SUBJECT to covenants and restrictions, and railroad consents, if any; and also subject to monthly tenancies and any state of facts an accurate survey would show.

The price is Twenty-five Thousand, Six Hundred Dollars (\$25,600), payable as follows:

Six Hundred Dollars (\$600) on the signing of this contract, the receipt of which is hereby acknowledged;

Five Thousand Dollars (\$5,000) in cash or certified check on the delivery of the deed as hereinafter provided;

Thirteen Thousand Dollars (\$13,000) by the purchaser taking said premises subject to a mortgage for that amount, now a lien on said premises, the principal of which mortgage became due December 1, 1909, and bears interest at five per cent. payable May 1st and November 1st of each year;

¹ See Chs. XXXVI and XXXVII, *supra*.

Seven Thousand Dollars (\$7,000) by the purchaser (or his assigns) executing and delivering to the seller a bond for that amount, and also a purchase money mortgage for like amount, to accompany said bond, the principal of which shall become due and payable, Five Hundred Dollars (\$500) on each interest day for five successive times, and the balance of principal, namely, Four Thousand, Five Hundred Dollars (\$4,500), shall become due and payable on January 1, 1914, the unpaid principal to bear interest at six per cent. per annum, payable January 1 and July 1 of each year; and which mortgage is to contain the usual ten days' interest and instalment clauses, and twenty days' tax and assessment clauses, insurance, warranty and receiver's clauses, and such other clauses as are usually inserted in second mortgages drawn by the attorney for the seller, which bond and mortgage shall be drawn by the attorney for the seller, the cost of drawing same, and of recording the mortgage and any recording tax thereon, to be paid by the purchaser (or his assigns).¹

The deed shall be delivered upon the receipt of said payments, at the office of Fred L. Gross at No. 189 Montague Street, Brooklyn, on December 1, 1910, at 11 A. M.

Rents, interest on mortgages, and insurance premiums, if any, are to be adjusted, apportioned and allowed up to the day of taking title (or day fixed for taking title).

THE SELLER AGREES that Friday & Lehmann are the brokers who brought about this sale and agrees to pay them the sum of Three Hundred Dollars (\$300) brokers' commission therefor.

THE SELLER FURTHER AGREES and hereby warrants that the sewer, gas and water are in the streets adjoining said premises and properly connected with said premises, and that there are no assessments, instalment or otherwise, against said premises.

THE SELLER FURTHER AGREES that at the time herein fixed for closing of title, it will produce and deliver to the purchaser certificates of the Tenement House Department of The City of New York showing that the buildings and improvements on said premises have been inspected, passed and approved by said department, and also certifying to the right to have said premises occupied, and also proper proof that said buildings have been passed by the Building Department of The City of New York.

IT IS AGREED that said premises are to be conveyed free and clear of all violations of the Tenement House Department of The City of New York.

This sale covers all right, title and interest of the seller, of, in and to any land lying in the bed of any street, road or avenue, opened or proposed, in front of or adjoining said premises, to the centre line thereof, and all right, title and interest of the seller in and to any award made or to be made in lieu thereof, and the seller will execute and deliver to the purchaser, on closing of title, or thereafter on demand, all proper instruments for the conveyance of such title and the assignment and collection of such award.

If there be a water meter on the premises, the seller shall furnish a reading to a date not more than thirty days prior to the time herein set for

¹ Where the property is to be conveyed subject to a first mortgage, and the purchase money mortgage will consequently be a second mortgage, the latter would ascend to the position of a first mortgage if the existing first mortgage is paid and satisfied. The result would be that the owner of the property could not obtain a new mortgage which would be prior in lien to the purchase money mortgage. To avoid this situation, it is quite common to insert a clause in the contract somewhat as follows: "Said mortgage is to contain a clause subordinating the same to any new first mortgage of \$..... should the present first mortgage at any time be satisfied, and such clause shall further subordinate said mortgage to any new first mortgage in place of the present first mortgage, provided the excess of such new first mortgage above \$..... is paid to the holder of this second mortgage on account of the principal sum, and that the holder of such second mortgage shall execute, acknowledge and deliver any instruments necessary or proper to effectuate such subordination as above agreed, provided he shall not be obliged to incur any expense in doing so (or, provided he shall be reimbursed for any expenses he may incur in doing so, to an amount not exceeding \$.....)."

closing title and the unfixed meter charge for the intervening time shall be apportioned on the basis of such last reading.

The deed shall be in proper statutory short form for record, shall contain the usual full covenants and warranty, and shall be duly executed and acknowledged by the seller, at the seller's expense, so as to convey to the purchaser (or his assigns) the fee simple of the said premises, free from all incumbrances, except as herein stated.

The seller shall give and the purchaser shall accept a title such as the New York Title Guarantee Company will approve and insure.

The gas fixtures, chandeliers, shades, awnings, gas ranges, mantels, mirrors over mantels, ash cans or receptacles now in or upon said premises, and the carpets, oil cloths and mattings in the halls of the buildings on said premises, and all personal property appurtenant to or used in the operation of said premises is represented to be owned by the seller and is included in this sale.

All sums paid on account of this contract, and the reasonable expense of the examination of the title to said premises are hereby made liens thereon, but such liens shall not continue after default by the purchaser under this contract.

The risk of loss or damage to said premises by fire until the delivery of the deed is assumed by the seller.¹

The stipulations aforesaid are to apply to and bind the heirs, executors, administrators, successors and assigns of the respective parties.

WITNESS the signatures and seals of the above parties.

EXECUTIVE REALTY COMPANY.

{ CORPORATE }
{ SEAL }

By WALTER GRAHAM,
President.

In the presence of²
HOWARD MCFARLANE.

WILMOT R. WETMORE. [SEAL]

Form 18.—Contract of Sale. Cook County, Illinois.³

CONTRACT OF SALE.

THIS AGREEMENT WITNESSETH, That.....
hereinafter called the purchaser, hereby agree...to buy, and.....
..... hereinafter called the seller,
hereby agree...to sell at the price of.....dollars,
and upon the terms and conditions herein specified, the following described
real estate, situated in the County of Cook and State of Illinois, to wit:
.....
together with all improvements thereon, including all screens for windows or
doors, storm doors, storm windows, awnings, shades, gas fixtures and globes,
electric light fixtures and globes, heating apparatus, gas ranges.....
.....and all other fixtures that pertain to and are a
part of said premises.

¹ Clauses for liquidated damages for breach of the contract are sometimes inserted. For such clauses see Forms 18-21, 25, 28.

² Acknowledgment may be added. An acknowledgment makes the contract admissible in evidence without further proof. N. Y. Code of Civil Pro., § 937.

³ This form is supplied by and published with the permission of the Cook County (Illinois) Real Estate Board.

Said premises are.....by.....feet.....
being also known as Number.....and
improved with.....

On compliance by the purchaser with his part of this agreement, the seller hereby agrees to convey to him a good and merchantable title to said premises by good and sufficient.....
warranty deed, with release of dower and homestead rights, and deliver possession of said premises free and clear of all incumbrances except the following, to which said conveyance is to be made subject, viz.:

1. General taxes levied after the year 19....
2. Special taxes or assessments levied for improvements not completed at the date of this agreement.
3. The following unpaid installments of special assessments which fall due after the date of this agreement, for improvements completed, viz.:
4. The following building lines and restrictions upon the use of the premises, viz.:
5. The following party-wall agreements, viz.:
6. Existing leases, expiring as follows:
7. The following mortgages or trust deeds, viz.:

.....
on which there remains unpaid.....
dollars.

The purchaser has deposited.....dollars as earnest money to be applied on the purchase. Within five days after the title has been accepted, or all material objections thereto have been cured, or after the seller has furnished a guarantee policy as permitted by this agreement, the purchaser, provided the said.....warranty deed is then ready for delivery, agrees to pay to the seller, at the office of.....
.....the additional sum of.....dollars,
and for the balance of the purchase price to make and deliver to the seller his principal note or notes, of even date with the said.....
warranty deed, for the sum of.....dollars,
payable

.....
with interest at the rate of.....per cent. per annum, payable semi-annually, and further evidenced by interest notes; said principal and interest notes to be secured by purchase-money trust deed on said premises to such trustee as the seller shall designate. The said notes shall be payable to the order of and endorsed by the purchaser.....and
both principal and interest notes shall bear interest after maturity at the rate of seven per cent. per annum until paid. Said principal and interest notes and trust deed shall be in the form known as Cook County Real Estate Board forms numbers 2, 3 and 4 respectively, including the provisions therein contained for payment in gold coin, and all the other provisions, conditions and stipulations, whether matters of form or of substance, contained in the printed forms of notes and trust deed above specified.

The seller shall, within.....days from the date hereof—
(a)¹ Furnish to the purchaser for examination a complete, merchantable Abstract of Title, or merchantable copy, brought down to the date of this agreement by the.....Title and Trust Company, of Chicago, Illinois, whose decision on the merchantability of said abstract or copy shall be final, showing good and merchantable title deducible of record in fee simple in the seller, subject only to the exceptions hereinabove specified;

(b)¹ Furnish to the purchaser a Title Guarantee Policy, issued by the.....Title and Trust Company, of Chicago, Illinois, brought

¹ Of options a, b and c, strike out two, leaving one standing.

down to the date of this agreement, guaranteeing the purchaser against loss or damage to the extent of the purchase price by reason of defects in or liens upon the seller's title, in their usual form, and subject only to the exceptions hereinabove specified and to questions of survey and rights of parties in possession and mechanics' liens not shown of record;

(c)¹ Furnish to the purchaser a Certificate of Title, issued by the Registrar of Titles of Cook County, Illinois, brought down to the date of this agreement, showing good and merchantable title in the seller, subject only to the exceptions hereinabove specified.

If an abstract of title be furnished, the purchaser shall, within..... days after the delivery of said abstract, deliver to the seller, with the abstract, a written statement of his objections, if any, to the title, or a written statement to the effect that the title is satisfactory. In case there are material objections to the title, the seller shall be allowed sixty days to cure the same. If all material objections are cured within said sixty days, the purchaser shall, upon tender of said..... warranty deed, pay or secure the said purchase price as herein provided. If the purchaser still rejects the title, the seller may, at his option, within..... days after said rejection, furnish the purchaser with a guarantee policy issued by the said Title and Trust Company in their usual form, guaranteeing the purchaser against loss or damage to the extent of the purchase price by reason of defects in or liens upon the seller's title, subject only to the exceptions hereinabove specified and to questions of survey and rights of parties in possession and mechanics' liens not shown of record; and said policy shall be accepted by the purchaser as curing all material objections to the title.....

Should the purchaser fail to perform his part of this agreement in the time and manner specified herein, the said earnest money shall, at the seller's option, be retained as liquidated damages, and thereupon this agreement shall become and be null and void as to the said premises.

The abstract, if any, goes with the title, and shall belong to the purchaser on completion of the sale, subject, however, to the right of any mortgagee or trustee in possession thereof.

In case of any loss or damage by fire before delivery of the..... warranty deed herein provided for, the purchaser may, at his option, either declare this agreement terminated, in which event his earnest money shall be refunded; or complete the agreement according to its terms, in which event he shall be entitled to all insurance money payable to the seller by reason of such loss or damage. Such option shall be exercised by notice to the seller in writing within five days after the loss or damage has been adjusted, and the purchaser notified in writing by the seller of the true amount thereof; otherwise the purchaser shall be deemed to have elected to proceed with the agreement according to its terms.

If the building should be destroyed or substantially injured before delivery of said deed by other accident or casualty than fire, the seller may restore the building at once and require performance of this agreement; otherwise the purchaser shall, at his option, be released, and his earnest money shall be refunded.

The..... warranty deed and the purchase-money notes and trust deed, if any, herein provided for, shall bear the same date as this agreement, but the interest on said incumbrance and on any other incumbrance on said premises, together with the rents, water taxes..... and the general taxes for the year 19....., reckoning said taxes from the 1st day of April, shall be adjusted pro rata as of the date of delivery of

¹ Of options a, b and c, strike out two, leaving one standing.

said deed. If the amount of the taxes for that year is not ascertainable, it shall be assumed to be the same as for the previous year. The seller shall be entitled to his pro rata allowance for premiums on unexpired insurance, provided said insurance is placed in companies acceptable to the purchaser and to the mortgagee or trustee, and provided all policies are delivered, properly assigned, at the time of the delivery of the said deed. Existing leases shall be assigned and delivered to the purchaser. All canceled notes relating to outstanding incumbrances shall be delivered to the purchaser, or, in lieu thereof, a written statement from the trustee or mortgagee to the effect that said missing notes have been paid.

Time is of the essence of this agreement, and of all the conditions thereof.

All covenants and agreements herein shall extend to and bind the heirs, executors, administrators and assigns of the respective parties.

This agreement and the earnest money aforesaid shall be held in escrow by who shall not record the same unless .he. deem .it necessary for the protection of the purchaser so to do, and who shall dispose of the earnest money according to the terms hereof; but the holder of said escrow shall not be liable except for gross negligence or willful default.

IN WITNESS WHEREOF, the said parties have hereunto set their hands and seals this.....day of.....A. D. 19.....

.....[SEAL]
.....[SEAL]
.....[SEAL]

IN CONSIDERATION of the execution of the foregoing agreement by the purchaser therein named, the undersigned assents to the terms thereof, and agrees to sign, acknowledge and deliver the.....warranty deed therein mentioned for the purpose of releasing and waiving all dower and homestead rights.

.....[SEAL]
.....[SEAL]

The foregoing agreement was negotiated and procured for the undersigned by.....who.....recognized as the broker....of the undersigned in the transaction.

.....
.....

STATE OF ILLINOIS }
COUNTY OF COOK } ss.:

I,.....in and for said County, in the State aforesaid, Do HEREBY CERTIFY, That..... personally known to me to be the same person..... whose name..... subscribed to the foregoing Contract of Sale, appeared before me this day in person, and acknowledged that..he.. signed, sealed and delivered the said Contract of Sale as..... free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and.....seal this.....day of.....19....

.....

{ NOTARIAL }
{ SEAL }

.....

Form 19.—Contract of Sale. Chicago, Illinois.¹

CONTRACT OF SALE.

THIS MEMORANDUM WITNESSETH, That.....
hereinafter called the purchaser....hereby
 agree...to purchase at the price of.....Dollars,
 the following described real estate, situate in the County of Cook, and State
 of Illinois, to wit:.....

(Description here.)

and
 hereinafter called the vendor..., agree... to sell said premises at said
 price, and to convey by full Warranty Deed with release of dower, inchoate
 or otherwise, and homestead rights or estates to said purchaser....a good
 and merchantable title thereto, subject to: (1) Existing leases expiring
; (2) Special assessments for im-
 provements not yet completed; (3) The installments not at the date hereof
 due of any special assessment for improvements heretofore completed; (4)
 Water taxes payable after.....; (5) General
 taxes levied or assessed after the year A. D.....; (6) Building
 lines, if any; (7) Building or liquor restrictions, if any; (8) Party wall
 rights or agreements, if any.

Said purchaser has paid.....Dollars
 as earnest money to be applied on said purchase when consummated, and
 agrees to pay within.....days after the title has been
 found good and merchantable or has been accepted, or after a guarantee
 policy, hereinafter mentioned, has been delivered to said purchaser subject
 as aforesaid and as hereinafter mentioned, the further sum of.....
Dollars, as follows, to-wit:.....

to be secured by note or notes and mortgage or trust deed of even date with
 the Warranty Deed above mentioned, on said premises in the form ordi-
 narily used by the Chicago Title and Trust Company.

The said vendor...agree...to furnish and deliver to.....
a complete merchantable abstract of title or merchantable
 copy thereof, within a reasonable time, brought down to include the date
 hereof.

Upon the receipt of said abstract the said purchaser... shall have....
 days thereafter in which to examine the title to said premises, and if upon
 such examination, objections to the title to said premises are found, then
 said abstract and a written statement of such objections shall be delivered
 to said vendor...and...he...shall have sixty days after receiving said
 abstract and written statement of objections within which to cure such ob-
 jections, and should said objections be not cured within said sixty days,
 then, unless the said vendor...shall (in case he deems such objections
 immaterial) within said sixty days furnish said purchaser with a guarantee
 policy in usual form, to be issued by the Chicago Title and Trust Company,
 guaranteeing said purchaser....against any loss or damage to the extent
 of the purchase price, by reason of defects in or liens upon the title of said

¹ Form of the Chicago Title & Trust Co.

vendor....to said premises at the date hereof, subject only as hereinbefore stated and as follows, to-wit: (1) Rights or claims of parties in possession not shown of record and questions of survey; (2) Mechanics' liens, if any, where no notice thereof appears of record; (3) Special taxes or special assessments, if any, which have not been confirmed by a court of record;

.....
.....
said earnest money shall be refunded and this contract shall become inoperative and be canceled, and surrendered to the vendor.....

Should said purchaser....fail to perform this contract on.....
.....part at the time and in the manner herein specified, the earnest money shall at the option of the vendor....be forfeited as liquidated damages including commissions to be paid by vendor....

In case of loss or damage by fire in or about any building or buildings which may be situated upon said premises, the purchaser....shall have the option of accepting all money derived from the insurance for such loss or damage and to complete this contract in the manner herein specified or of declaring this contract terminated, such option to be exercised within 5 days after such loss or damage shall be adjusted and the purchaser....notified in writing of the true amount thereof.

Existing leases and fire insurance, if any, are to be duly assigned to the purchaser....and the rents and premiums are to be adjusted pro rata as of the date of the delivery of said Warranty Deed.

It is understood that no tender of the deed or of said policy shall be required but that a notice addressed to said purchaser....at.....
.....and deposited, postage prepaid, in the post office in Chicago to the effect that said deed is, or in case of guarantee policy, as aforesaid, said deed and policy are, ready for delivery shall have all the force and effect of a tender of the same.

Time is of the essence of this contract and of all the conditions thereof.

This contract and the earnest money aforesaid shall be held in escrow by.....for the mutual benefit of the parties hereto.¹

Dated the.....day of....., A. D., 19.....

.....[SEAL]

.....[SEAL]

.....[SEAL]

THIS MEMORANDUM WITNESSETH, That the following Agreement shall be taken to be a part of the foregoing agreement and supplementary thereto, to-wit:

After the title to the real estate hereinbefore described has been examined and approved by the purchaser or his attorney, or the Chicago Title and Trust Company has indicated in writing its willingness to issue its guarantee policy as provided in said contract, then said purchaser shall deposit with the Chicago Title and Trust Company in escrow the balance of the purchase price aforesaid, together with the purchase money notes and mortgage or trust deed, if any, and the said vendor....shall deliver to said company, all abstracts of title, leases, insurance policies, tax receipts and title papers in his possession relating to said premises and the Warranty Deed aforesaid, which Warranty Deed, together with said mortgage or trust deed, if any, shall be by said company forthwith placed on record, and the abstract aforesaid or the searches for guarantee policy aforesaid shall be brought down to cover the date of record of said deed and trust deed or mortgage, if any, and if it shall then appear that the title passing to said purchaser....by said Warranty Deed answers the requirements of this con-

¹ See Form 32 *infra*, "Deed and Money."

tract, then the Chicago Title and Trust Company shall pay the purchase price and deliver the notes deposited with it hereunder to said vendor.... or to agent designated in writing, and deliver to the purchaser.... or agent designated in writing, the abstracts, guarantee policy, leases, tax receipts and title papers deposited with it under the terms hereof.

In case the title shall have been examined and approved by the purchaser.... or..... attorney as herein set forth, then the title to said premises shall be assumed to be as stated in the written opinion thereon and the title subsequent to the date of such opinion shall be examined and approved by..... upon whose opinion the said Chicago Title and Trust Company shall act in performing its duties as escrowee hereunder.

Real Estate broker's commission of..... to be paid by
..... to
Escrow fee to be paid by.....
Abstract fee to be paid by.....
Guarantee policy premium to be paid by.....
Recording fees to be paid as follows:.....
.....
.....

IN WITNESS WHEREOF, the said parties hereto have hereunto set their hands and seals this..... day of
....., A. D. 19....

..... [SEAL]
..... [SEAL]
..... [SEAL]

The following form of contract for sale of real estate provides for a title guarantee policy instead of an abstract of title.

Form 20.—Contract of Sale. Chicago, Illinois.¹

CONTRACT OF SALE.

THIS MEMORANDUM WITNESSETH, That.....
..... hereinafter called the purchaser... hereby
agree... to purchase at the price of..... Dollars,
the following described real estate, situate in the County of Cook, and State
of Illinois, to-wit:.....

(Description here.)

and
hereinafter called the vendor...., agree... to sell said premises at said price, and to convey by full Warranty Deed with release of dower inchoate or otherwise, and homestead rights or estates to said purchaser... a good and merchantable title thereto, subject to: (1) Existing leases expiring.....; (2) Special assessments for improvements not yet completed; (3) The instalments not at the date hereof

¹ Form of the Chicago Title & Trust Co.

due of any special assessment for improvements heretofore completed; (4) Water taxes payable after.....; (5) General taxes levied or assessed after the year A. D.....; (6) Building lines, if any; (7) Building or liquor restrictions, if any; (8) Party wall rights or agreements, if any

Said purchaser.... has paid.....Dollars as earnest money to be applied on said purchase when consummated, and agree.... to pay within.....days after the guarantee policy in substance and form hereinafter mentioned, has been delivered to said purchaser..., the further sum of..... Dollars, as follows, to-wit:.....

..... to be secured by note or notes and Mortgage or Trust Deed of even date with the Warranty Deed above mentioned, on said premises in the form ordinarily used by the Chicago Title and Trust Company.

The said vendor... agree.... to furnish and deliver to said vendee... within.....days from the date hereof, a guarantee policy in usual form, to be issued by the Chicago Title and Trust Company, guaranteeing said purchaser... against any loss or damage to the extent of the purchase price, by reason of defects in or liens upon the title of said vendor... to said premises at the date hereof, subject only to the matters hereinbefore stated and to the following matters, to-wit: (1) Rights or claims of parties in possession, not shown of record, and questions of survey; (2) Mechanics' liens, if any, where no notice thereof appears of record; (3) Special taxes or special assessments, if any, which have not been confirmed by a court of record;.....

..... and in case said Chicago Title and Trust Company shall be unable or unwilling to issue said guarantee policy within the time aforesaid, said earnest money shall be refunded and this contract shall become inoperative and be canceled, and surrendered to the vendor.....

Should said purchaser.... fail to perform this contract on..... part at the time and in the manner herein specified, the earnest money shall, at the option of the vendor..., be forfeited as liquidated damages including commissions to be paid by vendor.....

In case of loss or damage by fire in or about any building or buildings which may be situated upon said premises, the purchaser.... shall have the option of accepting all money derived or to be derived from the insurance for such loss or damage and to complete this contract in the manner herein specified, or of declaring this contract terminated, provided such option shall be exercised at any time after such loss by fire shall occur, and not later than five days after such loss or damage shall be adjusted and the purchaser.... notified in writing of the true amount thereof.

Upon the consummation of this sale, existing leases and fire insurance, if any, are to be duly assigned to the purchaser..., and the rents and premiums are to be adjusted pro rata as of the date of the delivery of said Warranty Deed.

It is understood that no tender of the deed or of said policy shall be required, but that a notice addressed to said purchaser.... at..... and deposited, postage prepaid, in the post office in Chicago, Illinois, to the effect that said deed and guarantee policy are ready for delivery, shall have all the force and effect of a tender of the same.

Time is of the essence of this contract and of all the conditions thereof. This contract and the earnest money aforesaid shall be held in escrow

by the Chicago Title and Trust Company for the mutual benefit of the parties hereto.¹

Dated the.....day of....., A. D., 19.....

.....[SEAL]
[SEAL]
[SEAL]

THIS MEMORANDUM WITNESSETH, That the following Agreement shall be taken to be a part of the foregoing agreement and supplementary thereto, to-wit:

After the title to the real estate hereinbefore described has been examined and approved by the Chicago Title and Trust Company, and it has indicated in writing its willingness to issue its guarantee policy as provided in said contract, then said purchaser.... shall deposit with the Chicago Title and Trust Company in escrow the balance of the purchase price aforesaid, together with the purchase money, notes and mortgage or trust deed, if any, and the said vendor.... shall deliver to said Company all abstracts of title, leases, insurance policies, tax receipts and title papers in his possession relating to said premises and the warranty deed aforesaid, which warranty deed, together with said mortgage or trust deed, if any, shall be by said Company forthwith placed on record, and the searches for guarantee policy aforesaid shall be brought down to cover the date of record of said deed and trust deed or mortgage, if any, and if it shall then appear that the title passing to said purchaser.... by said warranty deed answers the requirements of the foregoing contract, then the Chicago Title and Trust Company shall pay the purchase price and deliver the notes deposited with it hereunder to said vendor.... or to agent designated in writing, and deliver to the purchaser.... or agent designated in writing, the abstracts, guarantee policy, leases, tax receipts and title papers deposited with it under the terms hereof.

Real Estate broker's commission of..... to be paid by
 to

Escrow fee to be paid by.....

Guarantee policy premium to be paid by.....

Recording fees to be paid as follows:.....

IN WITNESS WHEREOF, the said parties hereto have hereunto set their hands and seals this.....day of
 , A. D. 19.....

.....[SEAL]
[SEAL]
[SEAL]

Form 21.—Contract of Sale. Philadelphia, Pennsylvania.²

CONTRACT OF SALE.

THIS AGREEMENT made the.....day of.....
 A. D. 19.....between.....of the first part and
of the second part;

WITNESSETH: That the said part....of the first part agree....to sell and convey to the said part....of the second part, and the said part....of

¹ See Form 32 *infra*, "Deed and Money."

² Supplied by Frederick M. Pile, Esq., of the Philadelphia Bar.

the second part agree....to purchase.....

 on the terms and conditions following to-wit.....

The part....of the second part further agree....to pay for all municipal improvements in the course of construction, at the date hereof, and for any such work commenced or completed between the date of this agreement and the time of settlement.

The Gas Fixtures, Heaters, Ranges, etc., annexed to the said building are included in said sale.

All Perpetual Policies of Fire Insurance to be paid for at withdrawal value and term Policies at proportionate value for unexpired term.

The premises are to be conveyed clear of incumbrance, easements and restriction.

Possession to be given.

TAXES, WATER RENT, INTEREST ON INCUMBRANCE (if any) RENTS, etc., to be apportioned as of the date of settlement, which is to be within.....
days from date hereof, time being of the essence of this Contract.

The Title is to be good and marketable and such as will be insured by any responsible Title Company, at the regular rates.

If the part...of the second part shall fail to complete this agreement within the time specified the same shall, at the option of the part...of the first part, become null and void and the sum paid on account shall be retained by the part...of the first part as compensation for the damage and expense to which he has been put on this behalf.

If for any reason a good and marketable title, such as will be insured as aforesaid, cannot be made, this agreement shall be void and the sum paid on account as above provided shall be returned by the part...of the first part to the part...of the second part in lieu of all claims for damage or otherwise.

In view of the injury which might result to the vendor from the recording of this paper, it is expressly agreed that it is not to be construed as an instrument entitled to record under the recording acts, and that it shall not under any circumstances be recorded.

Without precluding the right, if any, which either party may have to obtain by personal suit against the other, either specific performance or damages, it is expressly agreed, that, until consummated by delivery of a Deed, this Agreement shall convey no title to, or interest in the property, and neither this agreement, nor notice of it, nor suit upon it shall affect the rights of third persons and such persons may, until actual delivery and recording of a deed for the property to the vendee in accordance with the Agreement, deal with and acquire rights in said property as if no such Agreement had been made.

AND IT IS EXPRESSLY AGREED that the said.....
 are acting as Agents only and shall not be held personally liable or responsible by the Seller or the Purchaser for the fulfillment or non-fulfillment of any part or portion of this Agreement of Sale.

THE said Parties hereby bind themselves, their heirs, executors and administrators for the faithful performance of the above Agreement.

IN WITNESS WHEREOF, the said Parties have hereunto set their hands and seals the day and year first above mentioned.

Sealed and Delivered [SEAL]
 in the presence of [SEAL]

Form 22.—Contract of Sale. Boston, Massachusetts.¹**CONTRACT OF SALE.**

AGREEMENT made this.....day of.....
 19.... between..... SELLER....
 and BUYER....;
 binding each party mutually to the other and his and their respective heirs,
 executors and administrators.

THE SELLER...agree...to sell, and the BUYER...to buy, an Estate
 in Boston, being No.....on.....Street, bounded

THE SELLER...to convey, by a Quit Claim Deed, good title in fee
 simple to the premises, free of all liens for debts of deceased persons and
 incumbrances

to keep the buildings insured as at present; to pay or assign said insurance,
 in case of loss, to the Buyer..., unless the premises are restored to their
 present condition previous to the delivery of the Deed...and to pay a com-
 mission of.....per cent. to.....

THE BUYER...to pay.....Dollars,
 as follows:.....Dollars now;
Dollars on the
 delivery of the Deed;.....

and the balance by.....three-year note of even date with said
 deed bearing interest, payable half-yearly, at.....per cent.
 per annum, secured by Mortgage on said premises (Conveyancers Title In-
 surance Company's form); failing so to do, the money paid shall be for-
 feited as Liquidated Damages for breach of Contract; Rents, Interest, Taxes
 and Water Rates to be apportioned.

The money to be paid and the papers passed at the CONVEYANCERS
 TITLE INSURANCE COMPANY'S office at Twelve o'clock noon.....
 next.

WITNESS said Parties' hands and a common seal.

EXTENSION.

This AGREEMENT is extended until.....
 WITNESS our hands and common seal this.....day
 of.....19....

¹ This is the copyright form used by and supplied to the author by the Convey-
 ancers Title Insurance Company, Boston, Mass., and is published with the permission of
 that company.

Form 23.—Agreement for Sale of Property. Baltimore, Maryland.¹

CONTRACT OF SALE.

THIS AGREEMENT is made in duplicate this.....day of 19...., between.....
SELLER.... and..... PURCHASER....

The said seller....hereby sell....and agree....to convey, and the said purchaser....hereby buy....and agree....to pay for, the following property:

(Here insert description of property and size of lot.)

Being the property described in a.....dated.....
and recorded among the Land Records of Baltimore in Liber.....
No.....fol.....

The said property is in fee.

The said property is leasehold, subject to a ground rent of \$.....
per year, which is { irredeemable } after.....years from the date of
redeemable }
lease, at.....per cent.

The said property is a ground rent which is { irredeemable } after
redeemable }
.....years from date of lease at.....per cent.

(Strike out all except the kind of property intended.)

The purchase price is.....Dollars
(\$.....), payable in cash on or about the.....day of
.....19....; of the above sum there has been paid on
account the sum of.....Dollars
(\$.....), which last mentioned sum is to be repaid to the purchaser in the
event that the title is not satisfactory; time is of the essence of this agree-
ment.

Possession is to be given on.....

The property is subject to the following incumbrance:.....

Rentals, taxes, water rent, ground rent, and other charges are to be
adjusted to the day of transfer.

The title is to be clear of all incumbrances and assessments, and satis-
factory to the Title Guarantee and Trust Company.

WITNESS the hands and seals of the parties hereto.

.....[SEAL]
.....[SEAL]
.....[SEAL]

WITNESS:

NOTE.—As soon as the contract is signed, the purchaser should insure
the improvements. The signing of a contract of sale renders void the seller's
fire insurance policy; and if the improvements should be destroyed before
the property is insured by the purchaser, the loss would fall on the pur-
chaser.

NOTE.—If the property is in fee, the wife (if any) of the seller should
sign.

¹ Form of Title Guarantee & Trust Co. of Baltimore, Md.

Form 24.—Contract of Sale. New Jersey. (Short Form.)

.....

CONTRACT OF SALE.

AGREEMENT, made the.....day of.....
A. D., 19...., between.....
the first party, and.....
the second party, in manner following:

The first party in consideration of.....Dollars,
toduly paid, hereby agree....to sell unto the second party,

(Description here.)
for the sum of..... Dollars,
which the said second party hereby agree....to pay the said first party, as follows:

- On Execution of this Agreement..... \$.....
- On Delivery of Deed, Cash..... \$.....
- Bond and Mortgage for....years, @...% \$.....
- \$.....

Total, \$.....

And the said first party on receiving payments as above set forth, shall deliver to the said second party or to.....assigns a duly executed, full covenant and warranty deed, conveying to.....the fee simple of said premises, free from all incumbrance; said deed to be delivered at the office of The New Jersey Title Guarantee and Trust Company, Nos. 83 and 85 Montgomery Street, Jersey City, N. J., on or before.....
.....A. D., 19...., at.....M.

IN WITNESS WHEREOF, the parties to these presents have hereto set their hands and seals the day and year first above written.

Scaled and Delivered in[SEAL]
the Presence of[SEAL]
.....
.....

State of New Jersey, }
County of..... } ss.: BE IT REMEMBERED, That on this.....
day of.....A. D., 19...., before me.....
personally appeared.....
who, I am satisfied....the Grantor....in the within Deed of Agreement
named; and I having first made known to.....the contents thereof,.....
did.....acknowledge that.....signed, sealed and delivered the same
as.....voluntary act and deed, for the uses and purposes therein
expressed;
{ NOTARIAL }
{ SEAL }

Form 25.—Contract of Sale. New Jersey.

.....

CONTRACT OF SALE.

MEMORANDUM OF AGREEMENT, made the.....day
of.....in the year of our Lord, One Thousand, Nine

Hundred and.....between.....
of the..... ofin the County
of.....and State ofhereafter
designated the party of the First Part; and.....
of the..... ofin the County
ofand State ofhereafter
designated the party of the Second Part;
WITNESSETH: That the said party of the first part, for and in consider-
ation of the sum of.....
to be paid and satisfied as hereinafter mentioned, and also in consideration
of the covenants and agreements herein contained, made and entered into by
the said party of the second part, doth agree to and with the said party of
the second part, that.....the said party of the first part, will convey
to the said party of the second part,.....heirs and assigns, by
Deed of.....free from all encumbrance...
on or before the.....day of.....
Nineteen Hundred and.....; all.....lot
.....tract.....or parcel of land and premises,
hereinafter particularly described, situate, lying and being in the.....
.....ofin
the County of.....and State of.....

(Description here.)

And the party of the second part for.....
heirs, executors and administrators, doth covenant, promise and agree, to
and with the party of the first part,.....heirs,
executors, administrators and assigns, that.....the
party of the second part, will pay and satisfy or cause to be paid and
satisfied, unto the party of the first part the said sum of.....
as and for the purchase money of the foregoing described land and premises
in the following manner, that is to say:.....
.....
.....

AND IT IS FURTHER AGREED by the parties hereto, that the said Deed
shall be delivered and received at the office of.....
....., Newark, N. J., between the hours of.....
o'clock.....M. and.....o'clock....M. on the.....
day of.....19.....

In case of loss or damage to the property by fire before the title is
passed, the party of the first part shall allow to the party of the second
part the amount of such loss or damage, to be ascertained by arbitration if
the parties cannot agree.

And for the performance of all and singular the covenants and agree-
ments aforesaid, the said parties do bind themselves and their respective
heirs, executors and administrators; and they hereby agree to pay, upon
failure to perform the same, the sum of.....
which they hereby fix and settle as liquidated damages therefor.

IN WITNESS WHEREOF, the said parties have hereunto set their hands
and seals in duplicate the day and year first above mentioned.

.....[SEAL]
.....[SEAL]
Signed, Sealed and Delivered
in the Presence of
.....
.....
.....

Form 26.—Agent's Sale Contract. Chicago, Illinois.¹

.....

AGENT'S SALE CONTRACT.

Chicago, Illinois,.....19....

To.....

OWNER.

I HEREBY PROMISE AND AGREE to purchase upon the following terms and at the price of.....Dollars, the real estate known as Number..... Chicago, improved with.....

The legal description is.....

(Description here.)

I have paid the sum of.....Dollars as earnest money, which is to be held in escrow, together with this agreement, by.....

You are to furnish a merchantable abstract of title or a title guarantee policy for the amount of said purchase price, covering said property and brought down to this date. If the title is good, I am to accept it promptly, and within five days after such acceptance you are to be ready to deliver a sufficient warranty deed conveying to me a good title to said premises, subject to the following incumbrance, which is to be deemed a part of said purchase price, and the interest on which is to be pro-rated as of the date of delivery of said warranty deed, viz.:.....dollars due.....19.... with interest at..... per cent. per annum;.....Dollars due.....19....with interest at..... per cent. per annum.

Upon delivery of such warranty deed said earnest money shall be paid to you, and I agree to pay you at the same time the further sum of.....dollars. The balance of.....dollars is to be payable.....

with interest at the rate of.....per cent. per annum, due, at your option, annually or semi-annually, said deferred payment of principal and the installments of interest thereon to be evidenced by notes secured by trust deed on said property, which notes and trust deed are to be delivered to you at the time of the delivery of said warranty deed.

.....[SEAL]

.....[SEAL]

PURCHASER.

ACCEPTED.....19....

.....[SEAL]

OWNER.

.....

¹ This form is supplied by and published with the permission of the Cook County (Illinois) Real Estate Board.

Form 27.—Contract for Sale of Restricted Lots on Installment Plan.

CONTRACT OF SALE.

New York,.....19....

THIS AGREEMENT, made and entered into the day and year first above written, between the EXECUTIVE REALTY COMPANY, a corporation incorporated under the laws of the State of New York, party of the first part, andparty of the second part;

WITNESSETH: The party of the first part in consideration of the sum ofDollars, to be fully paid as hereinafter mentioned, and of the covenants and agreements hereinafter set forth, agrees to sell unto the said party of the second part, and the party of the second part agrees to buy ALL those certain lots, pieces or parcels of land, each twenty feet in width by one hundred feet deep, situate, lying and being in Nassau County and State of New York, and which on a certain map, filed in the office of the Clerk of Nassau County, entitled "Map of Idlewild Park, situate at Idlewild, Nassau County, Long Island, N. Y.," surveyed by William Williams, Civil Engineer, are known and distinguished as lots number.....

.....

block number.....

And the said party of the second part in consideration of the premises agrees to pay to the party of the first part the said purchase price, as follows: Dollars in cash on the signing of this agreement, and the balance thereof in monthly payments of..... Dollars, payable at the office of the party of the first part, on the..... day of each and every month thereafter until the said purchase price is fully paid.

The party of the first part on receiving the purchase price as aforesaid, shall at its own proper cost and expenses execute, acknowledge and deliver to the said party of the second part a general warranty deed and the usual full covenants for the conveying and assuring to him, the fee simple of the said premises free from all encumbrances, except that the said conveyance shall be made subject to the following covenants, which shall be taken to be real covenants running with the land and binding upon the party of the second part until January 1, 1925, when they shall cease and determine.

I. The party of the second part shall or will not carry on or suffer or permit to be carried on, on any portion of said premises, any manufacturing or selling or dealing in malt or spirituous liquors, or drinks of any kind, and will not erect or permit upon any part of said premises, any slaughter-house, smith-shop, forge, furnace, steam-engine, brass foundry, nail or other iron factory, or any manufactory of gunpowder, glue, varnish, vitriol, ink or turpentine, or for the tanning, dressing or preparing of skins, hides or leather.

II. The said party of the second part shall or will not erect or permit on any portion of said premises any tent or dwelling except a private detached dwelling house for not more than two families, nor less than two stories and an attic in height, nor of less cost than Fifteen Hundred (\$1,500) Dollars, nor with a roof of the character or description known as a flat roof, and no house shall be erected to front on any street except on which the lots front.

III. No part of any dwelling including piazzas, bay windows or steps shall be erected on any portion of said premises nearer than ten feet from the street line of the said premises, and no stable, automobile house,

summer house or greenhouse, shall be erected within sixty feet of said street. The main side walls of the dwelling house shall stand at least three feet from the side lines of the plot hereby conveyed, and no dwelling on said plot shall be constructed nearer than six feet from any other dwelling.

IV. No close board fence shall be erected or maintained; and no fence or hedge exceeding four feet in height shall be maintained on any part of the plot.

It is understood and agreed that the party of the first part will furnish with each deed, a title policy of the.....Company, of New York City, free of cost to the party of the second part, and that the said party of the first part shall pay all taxes on said premises for the yearsand.....

The said party of the first part further agrees to lay cement sidewalks, plant trees, and cut and grade all streets shown on the said map.

It is further understood and agreed that upon default in the payment by the party of the second part of two successive monthly payments of the purchase price under this contract, the party of the first part shall have the option forthwith to declare this contract void, otherwise the party of the second part shall pay interest at six per cent. on all deferred payments.

The deed to the said premises shall be delivered at the office of the party of the first part, No..... New York City, when the said purchase price and interest charges, if any, shall be fully paid.

And it is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, successors and assigns of the respective parties.

WITNESS the signatures and seals of the above parties.

.....[SEAL]
.....[SEAL]

Signed, Sealed and Delivered
in the Presence of

.....
.....

Form 28.—Contract for Sale of Lots on Installment Plan.¹

CONTRACT OF SALE.

THIS AGREEMENT, made this.....day of
.....A. D. 19....by and between.....
of.....party of the first part, and.....
..... ofparty of
the second part;

WITNESSETH: That the said party of the first part, in consideration of the payment hereinafter mentioned and of the stipulations hereinafter set forth, agrees to sell to said party of the second part, upon the terms and conditions hereinafter set forth, the following premises situated.....

(Description here.)

And the said party of the second part agrees to purchase said premises and to pay therefor the sum of.....Dollars in Gold Coin of the United States of present standard weight and fineness, or its equivalent, in actual market value in lawful money of the United States, in the manner following, viz.:

¹ Showing additional provisions.

The sum of.....Dollars upon the signing and delivery of these presents, receipt of which is hereby acknowledged, and the further sum of..... Dollars in each and every.....following the day of the date hereof, until said principal sum, with interest at.....per cent. per annum on all unpaid balances from date hereof, payable semi-annually hereafter, and all taxes or other assessments made..... subsequent to the date hereof are fully paid.

And it is mutually agreed by and between the parties hereto as follows:

First.—The party of the first part agrees to pay all taxes or other assessments becoming due, within one year from date hereof, but should title be taken within one year from date hereof then the party of the first part only pays taxes and assessments due at date of delivery of deed.

Second.—That all sums of money payable to said party of first part hereunder shall, until further notice, be paid at the office of..... in.....during their regular office hours, and the receipt of said.....shall be sufficient discharge therefor. All payments elsewhere, to whomsoever made, shall be at the sole risk and hazard of said party of the second part.....

Third.—That prompt performance and time are the nature and essence of this contract and each of its conditions, and therefore if default of payment is made of any one of said.....installments of said principal sum for a period of.....days after it becomes due, or if said party of the second part shall fail to perform any other of the Agreements on.....part herein contained, the balance of the principal sum then remaining unpaid shall immediately become due and payable, and all rights of the party of the second part under this Agreement, and all right, title, interest and claim in and to said described premises, shall, at the option of the party of the first part, become void and of no effect; and the said party of the first part shall be released from all obligations hereunder, and all moneys theretofore paid thereon shall be held as liquidated damages by the party of the first part.

Fourth.—That no modification of this agreement, nor waiver of any term or condition hereof, shall be of any force or effect, unless the same is in writing, signed by both of the parties hereto, and all contracts and agreements heretofore made by the parties hereto or their agents are merged into and superseded by this agreement; and that no waiver of the breach of any such term or condition shall be evidence of or construed as a waiver of any other or subsequent breach of the same or any other term or condition.

Fifth.—Said party of the second part doth hereby covenant and agree to and with said party of the first part,.....successors, and assigns as follows:

That neither said party of the second part.....heirs or assigns will erect or permit on any part of the herein described premises any buildings except a detached two story frame dwelling house with peaked roof upon each plot of at least forty feet front by.....feet in depth that shall cost not less than \$....., nor shall such building or any part thereof, except steps, piazzas or bay windows, and other usual projections be erected or maintained upon any part of said premises within.....feet of the line of.....

excepting that no building for business purposes shall be allowed on any street or streets, excepting that part on the west side of and fronting on....., but this exception does not include saloons or permission for sale of liquors of any kind, but does allow such buildings to be erected on the line of said....., and said building if erected, must be two story frame with peaked roof and detached; nor shall any milkman's stable be built, or slaughter house, or any manufactory for

making gunpowder, glue, varnish, vitriol, ink or turpentine, or for the boiling of bones, or for the dressing, tanning, or preparing of skins, hides, or leather, or any brewery, or any building for the carrying on of any noxious or dangerous trade or business; or sell, or suffer, or allow to be sold on the premises hereby conveyed, or any part thereof, strong or spirituous liquors, or ale, beer or wine, or intoxicating liquor of any kind. Such barn or stable for horses as is appurtenant to a private residence, is hereby permitted, and such barn or stable if erected, must stand at least sixty feet from the avenue or street upon which said premises front, and not less than fifteen feet from the line of any side streets or avenues; excepting that no stables are permitted on any part of the lots fronting on..... and.....in block number.....as shown on above mentioned map.

Sixth.—Said party of the first part further agrees to grade all streets and plant suitable shade trees thereon and lay cement sidewalks in front of each lot.

Seventh.—That upon the full payment of the said principal sum, with the interest as above provided, and the performance of the conditions hereof, said premises shall be conveyed to said party of the second part, by a proper Deed, containing a clause of general warranty, and the full covenants for conveying and assuring the party of the second part or to..... heirs or..... assigns, the fee simple of said premises free from all incumbrances except as hereinbefore mentioned in reference to taxes and above restrictions, together with all the right, title and interest of the party of the first part hereto, of, in and to the land lying in the Streets or Avenues in front of and adjoining said premises, to the center lines thereof, respectively, but reserving, however, to the party of the first part the exclusive right and privilege of giving and granting all easements, privileges and rights of way for mains of all kinds in any and all Streets or Avenues, and the party of the second part agrees to accept said Deed as full performance by said party of the first part of his covenants and undertakings.

Eighth.—The stipulations aforesaid are to apply to and bind the heirs, executors, administrators, and assigns of the respective parties.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first above written.

	..... [SEAL]
	..... [SEAL]
Signed, Sealed and Delivered	..... [SEAL]
in Presence of	

.....
.....

The form which follows is an assignment of the foregoing contract. This assignment is written or printed on the back of the instrument to which it pertains.

Form 29.—Assignment of Contract. Informal.

ASSIGNMENT.

For a good and valuable consideration to the undersigned, in hand paid, the receipt of which is hereby acknowledged,....., the

undersigned, part...of the second part to the foregoing agreement do... hereby grant, assign, sell, and set over unto..... all.....rights, title, interest, claim or demand in and to the within agreement, including the right to receive the deed therein mentioned in.....name; and the said.....in consideration of and by accepting this assignment, agree to the terms and conditions of said agreement, and to make all payments therein agreed to be made by the undersigned, and in all things to carry out and perform the same.

This assignment is subject to the approval of..... the party of the first part to the within agreement.

WITNESS.....hand thisday of..... 19.....

.....
.....

WITNESS:

I hereby consent to the foregoing assignment.

.....
.....

The following form is for use in New York City.

Form 30.—Contract for Exchange of Properties.

.....

CONTRACT FOR EXCHANGE.

AGREEMENT, made this.....day of..... 19....between.....herein designated as the party of the first part, andherein designated as the party of the second part, for the exchange of property;

WITNESSETH, as follows:

The party of the first part, in consideration of one dollar paid, the receipt of which is hereby acknowledged, and also in consideration of the conveyance by the party of the second part of the real property hereinafter mentioned, hereby agrees to grant and convey to the party of the second part, at a valuation for the purpose of this contract of..... Dollars, all that certain lot, piece or parcel of land with the buildings and improvements thereon erected, situate, lying and being inand bounded and described as follows:.....

(Description here.)

The party of the second part, in consideration of one dollar paid by the party of the first part, the receipt of which is hereby acknowledged, and also in consideration of the above conveyance by the party of the first part, agrees to grant and convey to the party of the first part, at a valuation for the purposes of this contract of..... Dollars, all that certain lot, piece or parcel of land with the buildings and improvements thereon erected, situate, lying and being inand bounded and described as follows:.....

(Description here.)

The premises which are to be conveyed by the party of the first part are to be conveyed subject to the following incumbrances:.....

.....

The premises which are to be conveyed by the party of the second part are to be conveyed subject to the following incumbrances:.....

The difference between the values of the respective premises, over and above incumbrances, shall be deemed, for the purposes of this contract, to be \$.....in favor of the party of the.....part, and the party of the.....part agrees to pay the same as follows:

Each of the parties to these presents hereby agrees to convey the property above described as sold by that party, free from all incumbrances, except as above specified, and to execute, acknowledge and deliver or cause to be executed, acknowledged and delivered to the other party, or to the assigns of the other party (the deed to be drawn in each case at the cost of the party of the first part thereto), a proper warranty deed containing full covenants duly executed and acknowledged to convey and assure to the grantee an absolute fee of said premises, except as herein stated.

The titles to be given and accepted hereunder shall be such as the.....
.....Company will approve and insure.

Said deeds shall be delivered and exchanged at the office of.....
.....on19....at.....M.

The chandeliers, gas fixtures, ranges, heating and hot water apparatus, water closets, bath tubs and other plumbing.....
now on said premises are to be included in this sale and in the warranty above set forth.¹

The rents of the said premises, insurance premiums, and interest on mortgages, if any, shall be adjusted, apportioned and allowed up to the day of taking title.

Each of the parties hereto assumes the risk of loss or damages by fire prior to the completion of this contract on the premises owned by them respectively. AND IT IS UNDERSTOOD that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, successors and assigns of the respective parties.

And for the true and faithful performance of all and every of the covenants and agreements above mentioned, the parties to these presents bind themselves, each unto the other, in the sum of.....
Dollars, as fixed, settled and liquidated damages, to be paid by the failing party, and which said sum shall constitute a specific lien on the premises of the failing party.

The brokers in this exchange are.....
representing the party of the first part, and.....
representing the party of the second part, and the usual commissions are to be paid to said brokers by their respective principals.²

WITNESS the hands and seals of the above parties.

.....[SEAL]
.....[SEAL]

Signed, Sealed and Delivered
in the presence of³

.....
.....

¹ See Forms 17-28 for further provisions which may be used where appropriate.

² If the broker has been acting for both sides, and wishes to assure himself that there shall be no question concerning his double employment, this clause may read as follows: "The parties hereto agree that is the broker who brought about this exchange, and that he acted for both parties hereto in doing so, and each of the parties hereto agrees to pay him his full commissions therefor (or, agrees to pay him the sum of \$..... as broker's commissions therefor)."

³ Acknowledgment may be added. An acknowledgment makes the contract admissible in evidence without further proof. N. Y. Code of Civil Pro., § 937.

Form 31.—Contract for Exchange of Property. Chicago, Illinois.¹

.....
CONTRACT FOR EXCHANGE.

THIS AGREEMENT, entered into this.....day of
.....A. D., 19....., by and between.....
..... of of
of the County of.....and State of
....., party of the first part,
and.....of the County of.....
and State of.....party of the second part;

WITNESSETH: That the party of the first part, in consideration of the
covenants and agreements of the party of the second part hereinafter set
forth, hereby agree...., upon the performance by said second party of said
covenants and agreements, to convey to said party of the second part by
.....General Warranty deed, including all estates of home-
stead and all rights of dower therein, at a consideration of.....
.....Dollars (\$.....) the following described real estate,
situated in the County of.....and
State of Illinois, to-wit:.....

(Description here.)

Section Township
North, Range....., East of the Third Principal Meridian.
Subject to (1) existing leases expiring.....
the purchaser to be entitled to the rents accruing after the delivery of the
deed hereunder; (2) all taxes levied after the year 19....; (3) all unpaid
special taxes and special assessments levied for improvements not com-
pleted at the date hereof, and any unpaid installments of special taxes and
special assessments for improvements completed at the date hereof, falling
due subsequent to the date hereof; also subject to any party wall agree-
ments of record; to building line restrictions and building restrictions of
record, and to.....

The party of the first part further agrees to pay to the party of the
second part, at the date of the delivery of the deeds hereunder, the sum of
.....Dollars (\$.....) cash, and.....

And the party of the second part, in consideration of the covenants and
agreements of the party of the first part above specified, hereby agrees, upon
the performance by said first party of the said covenants and agreements,
to convey to said party of the first part, by a.....
General Warranty deed, including all estates of homestead, and all rights
of dower therein, at a consideration of.....
Dollars (\$.....) the following described real estate situated in the County
ofand State of Illinois,
to-wit:

(Description here.)

Section Township
North, Range....., East of the Third Principal Meridian.
Subject to (1) existing leases expiring.....
the purchaser to be entitled to the rents accruing after the delivery of the

¹ This form is the one adopted by and is published with the permission of The Chi-
cago Real Estate Board, Chicago, Illinois.

deed hereunder; (2) all taxes levied after the year 19....; (3) all unpaid special taxes and special assessments levied for improvements not completed at the date hereof, and any unpaid installments of special taxes and special assessments for improvements completed at the date hereof, falling due subsequent to the date hereof; also subject to any party wall agreements of record; to building line restrictions and building restrictions of record, and to

The party of the second part further agrees to pay to the party of the first part, at the date of the delivery of the deeds hereunder, the sum of.... Dollars (\$....) cash, and.....

IT IS MUTUALLY AGREED, that each party hereto is to furnish the other within a reasonable time from the date hereof, either a certificate of title issued by the Registrar of Titles of Cook County, or a complete merchantable abstract of title, or merchantable copy thereof, brought down to cover this date, or merchantable title guaranty policy showing good and sufficient title at date of this contract in the respective parties hereto to the property hereby agreed to be conveyed by them.

IT IS FURTHER MUTUALLY AGREED, that in case an abstract or copy be furnished, the party so receiving same shall within ten days after receiving such abstract or copy deliver to the other party or his agent (together with the abstract) a note or memorandum in writing, signed by him or his attorney, specifying in detail the objections he makes to the title, if any; or if none, then stating in substance that the same is satisfactory.

In case material defects be found in said title, and so reported, then if such defects be not cured within sixty days after such notice thereof, this contract shall at the option of the party delivering such objections become absolutely null and void; notice of such election to be given to the other party; but the party delivering such objections may nevertheless elect to take such title as it then is, and in such case the other party shall convey as above agreed; provided, however, that such party delivering such objections shall have first given a written notice of such election, within ten days after the expiration of the said sixty days and tendered performance hereof on his part. In default of such notice of election to receive such title and accompanying tender within the time so limited, the party delivering such objections shall, without further action by either party, be deemed to have abandoned his claim upon said premises and thereupon this contract shall cease to have any force or effect as against said premises, or the title thereto or any right or interest therein, but not otherwise.

The notices required to be given by the terms of this agreement shall in all cases be construed to mean notices in writing, signed by or on behalf of the party giving the same, and the same may be served either upon the other party or his agent.

If the taxes and assessments to be paid by the vendor cannot be paid at time this contract is to be closed then the vendor is to pay same on or before May 1st, next ensuing.

IT IS FURTHER MUTUALLY AGREED, that interest on encumbrances, if any, and insurance premiums on policies held by mortgagees, if any, shall be adjusted as of the date of the delivery of the deeds hereunder.

IT IS FURTHER MUTUALLY AGREED, that brokerage fees or commissions shall be paid to by the respective parties hereto as heretofore agreed by them.

All deeds shall be passed and this negotiation closed at the office of within five days after the titles have been found good.

Time is declared to be of the essence of this agreement, and of all the conditions hereof.

This contract shall be held by.....
for the mutual benefit of the parties concerned, and after consummation
thereofshall cancel and
retain this contract permanently.

IN TESTIMONY WHEREOF, the said parties hereto have set their hands
and seals, the day and year first above written.

.....[SEAL]
.....[SEAL]
.....[SEAL]
.....[SEAL]

Form 32.—Deed and Money.¹

DEED AND MONEY.

Application No..... Escrow No.....
Chicago,.....19....

CHICAGO TITLE AND TRUST COMPANY:

hereby deposit with you.....deed from.....
toconveying.....
.....hereby deposits with you \$.....

The said deed is to be filed for record at once and when you are pre-
pared to issue your Owners' Guarantee Policy, in usual form, guaranteeing
the title of said grantee.....subject only to:

1. RIGHTS OR CLAIMS of parties in possession, not shown of record,
and questions of survey.

2. MECHANICS' LIEN CLAIMS, if any, where no notice thereof appears
of record.

3. SPECIAL ASSESSMENTS not confirmed, or confirmed after.....
.....19....

4. TAXES for the year 19....

5. BUILDING LINE established in instrument recorded as Document

6. RESTRICTIONS contained in instrument recorded as Document.....

7. AGREEMENT for party wall, recorded as Document.....

8. MORTGAGE INCUMBRANCE, recorded as Document.....

Amount due thereon.....Interest since.....
to be paid by.....Old Coupons?.....

9. SPECIAL ASSESSMENT, Warrant No.....

10. ACTS done or suffered by, or judgments against said grantee.....

You are then hereby authorized and directed to disburse said money as
follows:

Is there any commission to be adjusted through this escrow?.....

Are Fire Insurance Policies to be brought in?.....Are Mortgage
Clauses to be attached?.....\$.....

¹ See provisions in contracts of sale, Forms 19 and 20.

Are Leases to be brought in?.....
Are Water Taxes paid?.....Is receipt to be produced?.....
Objections Nos.....erased before signing.
Deliver Abstract and Policy to.....
Your charges are to be paid as follows:.....
.....
.....
.....
.....

Form 33.—Assignment of Contract.

ASSIGNMENT.

KNOW ALL MEN BY THESE PRESENTS, that I,.....
of....., in consideration of.....
.....Dollars to me paid before the sealing and delivery of these
presents, the receipt whereof is hereby acknowledged, have sold, assigned,
transferred and set over and by these presents do sell, assign, transfer and
set over unto..... of
his executors, administrators and assigns, to his and their own proper use
and benefit, all my right, title and interest in and to the annexed contract, to
have and to hold the same unto the said.....
his heirs, executors, administrators and assigns for his and their use and
benefit forever; subject, nevertheless, to the covenants and conditions therein
mentioned.

And I hereby authorize and empower the said.....
upon his performance of the said covenants and conditions, to demand and
receive of....., the vendor mentioned in the
annexed contract, the deed covenanted to be given in the said contract, in
the same manner to all intents and purposes as I myself might or could do
were these presents not executed; and I hereby direct the said.....
.....to execute and deliver such deed to said.....
accordingly.

IN WITNESS WHEREOF, I have hereunto set my hand and seal, this
.....day of.....19....

.....[SEAL]

In the Presence of,

.....
.....
.....

Form 34.—Assignment of Contract. Without Recourse.

ASSIGNMENT.

KNOW ALL MEN BY THESE PRESENTS, that I.....
ofin consideration of
.....Dollars to me paid before the sealing and delivery of these
presents, the receipt whereof is hereby acknowledged, have sold, assigned,
transferred and set over, and by these presents do sell, assign, transfer and
set over unto.....of.....

his executors, administrators and assigns, to his and their own proper use and benefit, all my right, title and interest in and to the annexed contract, to have and to hold the same unto the said.....his heirs, executors, administrators and assigns for his and their use and benefit forever; subject, nevertheless, to the covenants and conditions therein mentioned.

And I hereby authorize and empower the said..... upon his performance of the said covenants and conditions, to demand and receive of....., the vendor mentioned in the annexed contract, the deed covenanted to be given in the said contract, in the same manner to all intents and purposes as I myself might or could do were these presents not executed.

And it is understood and agreed that this assignment is made without recourse to me.

IN WITNESS WHEREOF, I have hereunto set my hand and seal, thisday of.....19....

.....[SEAL]

In the presence of,

.....
.....

.....

Form 35.—Demand for Performance of Contract of Sale.

.....

To MARGARET BROWN,
75 White Avenue,
Brooklyn, New York.

You will please take notice that we are ready, willing and prepared, and always have been, to deliver the deeds for the conveyance of the premises consisting of six lots at the Northeasterly corner of 2nd Avenue and 69th Street in the Borough of Manhattan of the City of New York, which you have contracted to purchase by a written agreement dated September 1st, 1910, and we hereby demand that you accept such deeds and pay the balance of the purchase price and close the title to said premises and perform said agreement on November 15th, 1910, at the place and hour mentioned in said agreement, to-wit, at the office of Francis H. Willetts, No. 123 West 42nd Street, New York City, at one P. M.

And for your failure to comply with this demand you will be held liable according to law.

Dated, November 12th, 1910.

JAMES H. McCALL.

.....

CHAPTER XL.

MISCELLANEOUS FORMS.

Any provisions of the following form not desired by either the broker or the principal may be omitted.

Form 36.—Authority to Broker to Sell.¹

BROKER'S AUTHORIZATION TO SELL.

I hereby employ and authorize.....
real estate broker(s), to sell for me, the premises known as No.....
in the city of....., being a lot.....feet by.....
feet on the.....side of.....street.....feet (East) of
.....street (avenue)², upon which there is (a three-story and base-
ment brown stone dwelling, or three-story frame store and dwelling, or as
the case may be), upon the following terms and conditions:

Gross price, \$.....payable as follows:

\$.....when contract of sale is signed;

\$.....by the purchaser taking same subject to a mortgage for that
amount, due.....bearing interest at.....% per annum, payable
(May 1) and (November 1);

\$.....by the purchaser giving me a purchase money bond and mort-
gage for that amount, due.....bearing interest at....% per annum,
payable.....and....., and containing the usual interest,
instalment, tax, assessment, insurance and warranty clauses (or special
clauses if desired);

\$.....in cash when the deed is delivered.

Warranty deed to be delivered 30 days after date of contract.

Covenants and restrictions against the premises.....

.....
Encroachments

Fence variations

Railroad consents

For bringing about a sale of said premises, or producing a purchaser
ready, willing and able to purchase the same, on the above terms, or on
any other terms or conditions to which I shall assent, I hereby agree to pay
said broker(s) the sum of \$.....commissions, (or a sum equal to....%
on the gross price as his (their) commissions).

¹ While written authority is not necessary in all jurisdictions, (see Ch. III *supra*) still it is always wise, even at some inconvenience, to have the vendor state explicitly the terms on which he will sell. If any dispute should then arise as to whether the broker has produced a purchaser on the principal's terms, the dispute will not have to be determined upon any conflicting evidence as to what the terms were, as is often the case when the terms are given to the broker orally.

² Space may be reserved for diagram of property.

Commissions shall be due and payable when a customer is produced upon above terms and conditions.¹

The authority hereby given shall continue for.....months.

I hereby authorize said broker(s) to give a receipt in my name for any deposit received on a sale according to the above terms and conditions, and also authorize him (them) to sign in my name any contract he (they) may make with a purchaser of said premises on the above terms and conditions.

In the event of the sale of said premises by said broker(s) or by anyone else, including myself,² while this agreement is in force, I agree to pay said broker(s) the full commissions above agreed upon.³

Dated.....

Form 37.—Exclusive Agency Contract. Chicago, Illinois.⁴

AGENCY CONTRACT.

CHICAGO, ILLINOIS.....19....

I HEREBY GRANT YOU, for a period of.....months from this date, and thereafter until this agreement is revoked by notice in writing delivered to you, the exclusive right to sell the property hereinafter described; and in consideration of your accepting said agency and endeavoring to sell said property I agree to pay you a commission of.....per cent. of the price obtained if a purchaser is procured during said period, by you or me or anyone else, upon the terms named or upon any other terms which I shall accept.

Said property is known as Number.....Street, Chicago, and is improved with.....

The legal description is.....

(Description here.)

The price of said property is.....Dollars.

The terms of sale are as follows: The sum of.....Dollars is, upon the signing of an agreement of sale, to be paid by the purchaser as earnest money, and said agreement and earnest money are to be held by.....in escrow. The further sum of.....dollars is to be paid upon acceptance of the title and delivery and acceptance of a sufficient warranty deed conveying a good title to said premises. Both of said sums are to be paid to me upon delivery of said deed.

The said conveyance is to be made subject to the following incumbrance, viz.:.....dollars due 19..... with interest at.....per cent. per annum.....dollars

¹ See §§ 117-119 *supra*.

² Omit this provision if exclusive agency is not desired. Even though the broker is given the exclusive agency, the principal may always sell independently of the broker, unless, as is the case here, he precludes himself from so doing. See §§ 239, 240 *supra*.

³ See also Form 37 *infra*.

⁴ Supplied by and published with the permission of the Cook County Real Estate Board. When this form is used the "Agent's Sale Contract" (Form 26) is annexed in order that any offer made on the property may be in the exact terms of the exclusive agency.

due19.... with interest at.....
per cent. per annum.

The principal of said incumbrance is to be deducted from the purchase price above named, and the interest thereon is to be prorated as of the date of the delivery of said deed.

Payment ofdollars of said purchase price may be deferred for not more than.....years, with interest at.....per cent. per annum, evidenced by notes secured by trust deed, which are to be delivered to me at the time of delivery of said deed. The principal may be made payable on or before a given date.

I agree to deliver, at my option, either a merchantable abstract of title or a title guarantee policy for the amount of the above named purchase price, covering said property and brought down to the date of the agreement of sale above provided for; and within five days after the acceptance of the said title I agree to deliver a good and sufficient warranty deed conveying said property in accordance with such agreement.

Singular pronouns of the first person shall be read as plural when this agreement is signed by two or more persons.

.....[SEAL]
.....[SEAL]

ACCEPTED:

.....[SEAL]

Form 38.—Authority to Broker to Exchange Property.

BROKER'S AUTHORIZATION TO EXCHANGE PROPERTY.

I hereby employ and authorize.....
real estate broker(s) to exchange for me, premises known as No.....¹
for such other premises as shall be acceptable to me, (or for premises of the following nature: state same).

Such exchange shall be made upon the following terms and conditions:²

For the purposes of such exchange my said premises shall be valued at \$.....

The premises hereby authorized to be exchanged are subject to:

Mortgages
Covenants and restrictions
Encroachments
Fence variations
Railroad consents.....

Warranty deeds to be exchanged 30 days after date of contract of exchange.

For bringing about such exchange on above terms and conditions, or on any other terms and conditions to which I shall assent, I hereby agree to pay said broker(s) \$.....commissions, (or a sum equal to.....% on the gross price fixed for my said premises, as his (their) commissions), and I also agree that said broker(s) may charge, collect and receive commissions from the other party or parties to such exchange; commissions to be due and payable when a customer is produced upon above terms and conditions.³

Dated.....

¹ Insert particulars as in Form 36.

² See Form 36.

³ See Form 36 for additional provisions, if desired.

The following contract may be used where salesmen are employed on commission, this commission to be paid as purchase price is paid to the principal.

Form 39.—Salesman's Contract.

CONTRACT.

MEMORANDUM OF AGREEMENT, made this day of 19...., between EXECUTIVE REALTY COMPANY, a corporation incorporated under the laws of the State of New York, party of the first part, and party of the second part;

WITNESSETH: That the party of the second part for and in consideration of the sum of One Dollar, to him in hand paid by the party of the first part, the receipt whereof is hereby acknowledged, and of the premises and agreements hereinafter contained, hereby agrees to act as the agent of the party of the first part in the sale of lands, upon and only upon the following terms and conditions, and to devote his entire time, attention and talents to the exercise of such agency in strict conformity with the rules and regulations established by the party of the first part and the terms and conditions herein contained, and such additions, amendments or modifications of the same as may be made from time to time by the party of the first part.

AND IT IS EXPRESSLY UNDERSTOOD AND AGREED by and between the parties hereto, that the party hereto of the second part is hereby vested with and has only the powers hereinafter specifically granted, and has and is to have no implied powers, and is not to act or assume to act for or represent the party of the first part, except as herein directed and authorized, and is not, nor shall not be entitled to receive any other or different or additional compensation than that herein expressed.

IT IS HEREBY EXPRESSLY AGREED by and between the parties hereto as follows:

First.—That the party of the second part shall be entitled to receive a commission at the rate of per cent. (on installment sales and on cash sales) the same to be payable as follows: IT BEING EXPRESSLY UNDERSTOOD AND AGREED that commissions hereunder are to be paid only at the times, in the manner and as hereinafter mentioned.

(1) The party of the second part shall be entitled to receive commissions only after the regular agreement papers and physician's certificate (when required) have been signed and delivered to the party of the first part, and such commissions are payable only from one-half of the cash receipts from the respective sales, and should a customer default in payments before the said party of the second part has received his full commission on a sale on which there has been default in payments, then and in that case the party of the second part shall have no claim for further commissions on such sale; and it is further provided that when the said party of the second part ceases to be actively engaged in the sale of lands for the party of the first part as hereinafter provided, that then and thereafter commissions hereunder shall be payable only from one-quarter of the actual cash receipts from such sale.

(2) Commissions on cash sales or any sale where a discount is allowed to the purchaser on the whole or any portion of the purchase price shall be computed and paid only on the purchase price, less the discount for cash, unless the agent desires to have his commission paid by installments in the same manner as if the purchase price had been paid in installments, then the

commission is to be computed and paid on the full purchase price of the lots sold and as herein provided.

Second.—The party of the second part hereby agrees that he will report daily at the office of the party of the first part to which he may be attached, and in case he shall fail to do so for three consecutive days, he shall be deemed to be no longer actively engaged in the sale of lands for the party of the first part, and shall thereafter be entitled to receive on account of commissions only one-quarter of the receipts from lots sold by him as hereinabove provided.

Third.—That the said party of the second part shall have no authority whatsoever to alter, modify or change in any manner any of the agreements, contracts, deeds or other instruments under which the party of the first part offers lands for sale and that said party of the first part will not recognize any alteration, modification or other change of any agreement, contract, deed or other instrument nor any claim for commissions on sales made otherwise than upon its regular terms.

Fourth.—That the party hereto of the second part is positively prohibited from publishing or circulating, or causing to be published or circulated any documents or advertising matter of any kind whatsoever relating to the lands which the party of the first part offer for sale unless duly authorized in writing by the party of the first part, except that the foregoing provision shall not apply to any matter furnished and used under direction of the party of the first part.

Fifth.—That the party of the second part shall incur no indebtedness of any kind whatsoever for which the party of the first part shall be in any way liable.

Sixth.—All moneys received or collected by the party of the second part are to be securely held by him as a fiduciary trust, and shall be in no case used for any personal purpose whatsoever, but shall immediately be paid over to the party of the first part.

Seventh.—The party of the second part must report all business to the party of the first part at its office in New York City to which he is attached or as may be directed, and must settle all accounts as often as required.

Eighth.—The ledger accounts of the party of the first part shall be competent and conclusive evidence of the state of accounts between the parties to this contract.

Ninth.—If in any case the party of the first part shall deem it wise to return the amounts paid in on account of any contract or agreement for sale of lands and cancel the same by reason of any misrepresentations on the part of the party of the second part or for any other cause, then the party of the second part shall be bound to repay to the party of the first part on demand, the amount of commission received on account of the contract or agreement so canceled.

Tenth.—Either party hereto may rescind the foregoing contract on ten days' notice in writing to that effect, and upon the mailing of such notice by said party of the first part to the party of the second part to the address hereinabove contained, all the rights and interests of said party of the second part hereunder shall cease and determine, except as herein provided, but it is expressly understood and agreed that the party hereto of the second part shall not have the right to terminate this contract unless all indebtedness due from him to the party of the first part shall have been settled to its satisfaction; and after such settlement the party of the second part shall be entitled to receive the balance of his commission on lots sold prior to the termination of this contract at the rate of one-quarter of the cash receipts from such sales, subject, however, to all the conditions and agreements in respect to commissions herein contained.

Eleventh.—The rights of the party of the second part in the foregoing contract shall not be sold or assigned.

Twelfth.—This contract shall be construed, interpreted and enforced according to the laws of the State of New York.

Thirteenth.—Any rules of the party of the first part or any additions, amendments or modifications of this agreement made by the party of the first part hereto as herein provided shall be as effective as if herein written and contained when the same are posted on the bulletin board at the main office of the party hereto of the first part in the City of New York or the office to which the party of the second part may be attached. And this shall apply as well to the rate of commissions or salary payable hereunder as to other terms, conditions and agreements herein contained.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals the day and year first above mentioned.

.....[SEAL]
.....[SEAL]

Sealed and Delivered
in the Presence of,

.....
.....

.....

Form 40.—Application for Loan. New York City.

.....

APPLICATION FOR LOAN.

Date..... No.....

The undersigned desires to procure a mortgage loan on premises described below, as follows:

First Mortgage, \$..... at.....%..... Years

Bond of

Street and No.....

Dimensions of Lot No. of Stories.....

Dimensions of Building.....

Description of Building.....

Building Material

Building finished or unfinished.....

Age of Building

Have any alterations or additions been made in the last six months?.....

.....

RENT.

NO. OF ROOMS.

(Estimate rents of portion of building
occupied by owners)

.....	Basement	.....
.....	1st Floor	.....
.....	2nd Floor	.....
.....	3rd Floor	.....
.....	4th Floor	.....
.....	5th Floor	.....

Purpose of use.....

Tenant on lease..... Monthly.....

Present 1st Mtge..... held by..... due.....

Present 2nd Mtges..... held by..... due.....

No payments will be made until acceptable fire insurance is furnished.

Plans and specifications must be furnished when loan is desired on unfinished buildings.

VALUATION.	
Land .....	.....
Building .....	.....
<hr/>	
Total .....	.....
ASSESSED VALUATION.	
Land .....	.....
Building .....	.....
<hr/>	
Total .....	.....

If this loan is accepted within.....days, the undersigned agrees to pay to.....the sum of \$.....for procuring the same which amount shall cover charges for examination and guarantee of title, drawing and recording papers, survey and mortgage tax.

Name.....	Address.....
.....
.....

Form 41.—Application for Loan. Chicago, Illinois.

.....

APPLICATION FOR LOAN.

Chicago,.....19....

To.....hereby make application for a loan of \$.....for.....years, with interest at the rate of.....per centum per annum, payable semi-annually, at such place as lender may dictate; and as security for said loan will give.....Promissory Note (together with Warrant of Attorney to confess judgment in case of default in payment of same), secured by Deed of Trust on the following described Land and improvements, to-wit:.....

Said land being in the.....and having a.....front of.....feet on.....with a depth of.....feet to a.....foot alley.

The improvements thereon are.....

The present cash value of the land is.....\$.....
The present cash values of the improvements is.....\$.....
Making a total present cash value of.....\$.....

The said premises are free from incumbrance of any and every kind and description, and.....ha....a perfect title thereto, and full authority to incumber or sell the same.agree to furnish a complete and full Abstract of Title to the said premises for examination by such Attorney or Attorneys as you may select. Said Abstract of Title to be continued so as to show the loan hereby applied for, and also to insure all buildings situated upon the said premises, and furnish you with the Insurance Policy, with clause therein making the loss (if any) payable to such person as you may elect, the said Policy to be made to cover the amount and time of the loan hereby applied for, by such Insurance Company

as you may select or approve. . . .also agree to pay all charges and expenses for the examination of title and appraisal of said property, and all advances by you made for Abstracts of Title, or for any other purpose incident to the making of said loan, whether loan is made or not.

The Abstract of Title and Insurance Policies furnished, as herein agreed, to be held by you or your assigns, executors or attorneys, at the risk of the undersigned, during the continuance of said loan, until the same is fully paid.

.....

No.

Having this day made application to.....for a loan of \$.....upon Real Estate security.....hereby agree to pay....h.....per cent. on said amount applied for, as commission; also for the examination of the Abstract of Title, and money advanced to the undersigned, and all other expenses incident to the making of said Loan. To secure said amounts a first lien is hereby given to said.....on all written instruments and personal property owned or delivered by undersigned to....h.....and in case the title to, or the value of, the real estate offered as security is insufficient or unsatisfactory to said.....then, in such case, if the amount of said commissions, advances and expenses is not paid within.....days after notice of the rejection of said loan is given by said.....to the undersigned, then said.....may, at any time, without notice to the undersigned, sell, at public or private sale, said written instruments and personal property, or either or any part thereof, and apply the proceeds of such sale to the payment of said commissions, expenses and advances.

Dated.....19....

.....

.....19....

.....accept the within application. When the papers securing the same are executed you will draw for \$.....on.....and forward the Notes and Deed, when recorded to.....

.....

Form 42.—Application for Loan. St. Louis, Missouri.¹

APPLICATION FOR LOAN.

(Not to be considered unless each question is answered.)

I hereby make application to the TITLE GUARANTY TRUST Co. for a loan of dollars, payableat..... per cent. interest per annum, to be paid.....(principal and interest to be payable at said Company's office) and state that application is not pending and will not be made elsewhere, until an adverse decision is rendered; said

¹ Form of the Title Guaranty Trust Co. of St. Louis, Mo.

Company to have.....days for its consideration, and is hereby given the exclusive right to take the proposed mortgage.

Location of property

Description of improvements and when erected }

Location, description and grade of lot }

Are street, alley and sidewalk paved? }

If so, with what?

Is property sewered?

Are there gas and water pipes?

Mortgagor's name

Give address and business.....

Who would you name as reference?.....

By whom and for what purpose occupied? }

If tenant, give name, business, rental, and term of tenancy }

If by owner, give rental value

Have there been any repairs or alterations to premises, any street, sidewalk, sewer or alley improvements made or contracted for within six months? }

Value of ground

Value of buildings.....

If improvements to be made, state cost.....

Date of purchase and cash consideration paid }

Assessed value for taxation and amount of last year's taxes }

Give exact statement of present incumbrance, name and address of mortgagee, amount and rate. }

How much insurance now carried?.....

Does applicant agree to have property insured in amount, company and terms satisfactory to mortgagee? }

In whose name is title now vested?.....

Wife or husband's full name.....

Are there any judgments, taxes, special tax bills or other liens against the property not enumerated above? }

What other property, if any, does applicant own? }

Give value and incumbrance, if any. }

General remarks: }

Full certificate of title by TITLE GUARANTY TRUST Co., fire and storm insurance policies payable to mortgagee or trustee, covenant to pay taxes, and such other papers as are desired by said company, are to be furnished by me. And I do hereby agree to pay to said TITLE GUARANTY TRUST Co. the sum of.....dollars for expenses in connection with this loan, which amount is to include cost of examining property, title, preparing and recording papers, acknowledgments, etc. If, during the examination, the application shall be withdrawn, I will pay the sum ofdollars, for all expenses incurred. I hereby state that I hold or will acquire the undisputed title in fee simple to the real estate herein described, and the proposed mortgage is to be the first lien thereon; that I do not owe any money to mechanics, builders or others for work done or materials furnished upon the property not otherwise specified; that I am not surety upon any bond which can become a lien upon said property, and that these statements are made for the purpose of securing said loan.

I promise to furnish to the said TITLE GUARANTY TRUST Co. a satisfactory bond insuring erection and completion of improvements and indemnity against mechanics', material liens, or laborers' liens, judgments, costs and fees of any description that may be had against the premises described, by reason of my failure to pay and satisfy any and all such claims.

THIS LAST CLAUSE TO APPLY IN CASE THE IMPROVEMENTS, IF ANY, HAVE NOT BEEN COMPLETED SIX MONTHS.

ANY AGREEMENTS MADE HEREUNDER BY THE TITLE GUARANTY TRUST Co. SHALL BE ABROGATED IF THE APPLICANT HAS CONCEALED OR MISREPRESENTED ANY MATERIAL FACT IN THIS APPLICATION.

Date.....Applicant.

P. O. or Street Address.....

Form 43.—Application for Loan. Baltimore, Maryland.

APPLICATION FOR LOAN.

To the TITLE GUARANTEE AND TRUST COMPANY: (of Baltimore, Md.)

The undersigned hereby applies to your company for a first mortgage loan of.....dollars, as follows:

(Strike out the loan not desired.)

A straight loan for.....years, with interest at..... per cent., payable { half yearly.
quarterly.

An installment loan, payable in sixty monthly installments of \$..... each, and also a monthly payment of one month's proportion of the ground rent, taxes, water rent and insurance.

(Fill up all the following blanks.)

Property

Size of Lot.....In Feet.....Ground Rent \$.....

{ Redeemable
Irredeemable.

Brick store { Size of building.....Number of Rooms.
Frame dwelling {

Number of Stories.....Rental, \$.....per { month
year

Are taxes paid up?.....

Occupied by { owner white When purchased.....
 { tenant colored

Consideration \$.....

What incumbrances are now on the property?.....

Title—In whom

Remarks:

The undersigned agrees to pay to your Company \$..... for its services for inspection of the property, search of title, drawing legal papers, etc., and also agrees to pay the lawful charges for acknowledgments, recording, etc., and to deposit with your Company fire insurance policies in the amount and companies required. If the undersigned fails to take the loan after it has been accepted by the Company, the undersigned will pay one-half of the above sum. If the loan is declined because of a defect in title the undersigned agrees to pay half of the title examination fee. It is agreed that after the Company accepts this application, it reserves the privilege of declining the loan afterwards, for any reason deemed sufficient by it.

Date19.... Signature.....
Telephone { C. & T.
Md.

Address.....

REPORT OF REAL ESTATE OFFICER ON THE ABOVE APPLICATION.

I have examined the above property and report as follows:

The property is a } brick store No. of stories.....
 } frame dwelling
 The rental value is \$.....per month.
 Condition of the property—are the walls plumb?.....
 I consider the property salable at public auction for \$.....
 and recommend that { a straight loan of \$.....be granted.
 { an installment

Real Estate Officer.

Date.....19....

A straight
An installment } loan of \$.....on the above property is approved:

Form 44.—Encroachment Agreement.¹

ENCROACHMENT AGREEMENT.

AGREEMENT, made this sixth day of October, in the year Nineteen Hundred and Ten, between JOSEPH SCOTT and ANNIE SCOTT, his wife,² of

¹ Available for the protection of a party on whose premises fences or retaining walls encroach. The form may be varied to suit the circumstances of other cases.

² Though the title is in the husband, his wife should join in the agreement. Some conveyancers require mortgagees to join also.

the Borough of Brooklyn of the City of New York, County of Kings and State of New York, parties of the first part, and LIDA MOORE, of the same place, party of the second part;

WHEREAS, the said parties of the first part are the owners in fee of the lot and premises known as No. 190 Suydam Street in the Borough of Manhattan of the City of New York, being a lot of ground, twenty-five (25) feet front and rear by one hundred (100) feet in depth on the southeasterly side of Suydam Street one hundred and fifty (150) feet southwesterly from the intersection of the southeasterly side of Suydam Street with the southwesterly side of Hanover Avenue, and hereinafter designated as the lot and premises of the parties of the first part, and the said party of the second part is the owner in fee of the lots and premises known as Nos. 192 and 194 Suydam Street in the Borough of Manhattan of the City of New York, aforesaid, being a plot of ground fifty (50) feet front and rear by one hundred (100) feet in depth, on the southeasterly side of Suydam Street one hundred (100) feet southwesterly from the intersection of the southeasterly side of Suydam Street with the southwesterly side of Hanover Avenue immediately adjoining to and on the northeasterly side of said lot and premises of the parties of the first part, and hereinafter designated as the lots and premises of the party of the second part; and

WHEREAS, the said land and premises of the parties of the first part, are higher than the adjoining land and premises of the party of the second part, and a wall or fence has been erected for the purpose of retaining the soil of the lot and premises of said parties of the first part, which wall or fence, however, stands wholly or almost wholly on the lots and premises of the party of the second part, and runs along or near the division line of the lots and premises of the parties of the first part and the party of the second part, beginning at a point at or opposite the rear end of the house erected upon the lot and premises of the parties of the first part and running to or beyond the rear end of the lots and premises of the parties of the first part and the party of the second part:

NOW THEREFORE, this agreement witnesseth, that in consideration of the sum of one dollar and other good and valuable considerations in hand duly paid to the said parties of the first part, the receipt whereof is hereby acknowledged, the said parties of the first part do hereby covenant, stipulate and agree that the said parties of the first part do not own or claim to own any part of the soil within the boundaries of the lots and premises of the party of the second part upon which such wall or fence stands, and that the said parties of the first part do not have or claim to have any easement, right, title or other interest in and to any part of the soil within the boundaries of the lots and premises of the party of the second part upon which such wall or fence stands, and that the parties of the first part do not have or claim to have any right or privilege to have such wall or fence or any part thereof standing or remain upon the lots and premises of the party of the second part, or any part thereof, and that the party of the second part, her heirs and assigns, may at any time remove such wall or fence or so much of such wall or fence as is within the boundaries of the lots and premises of the party of the second part, so that no part of such wall or fence shall protrude, extend, be or remain beyond a line drawn in continuation of the southwesterly side of the house on the lot and premises of the parties of the first part to the rear of the lots and premises of the party of the second part; and

IT IS FURTHER MUTUALLY AGREED between the parties hereto that no part of the fee of the soil upon which said wall or fence or any part thereof stands, has passed to or is vested in the said parties of the first part or any of their predecessors in title nor shall pass to or be vested in the said parties of the first part, their heirs or assigns.

IN WITNESS WHEREOF, the parties to these presents have hereunto set their hands and seals the day and year first above written.

JOSEPH SCOTT.
ANNIE SCOTT.
LIDA MOORE.

[L.S.]
[L.S.]
[L.S.]

In the presence of,
HORACE T. WALSH.
THOMAS L. PATTERSON.

(Acknowledgments in proper statutory form.)

Form 45.—Encroachment Agreement.¹

ENCROACHMENT AGREEMENT.

AGREEMENT, made this twelfth day of October in the year Nineteen Hundred and Ten, between SAMUEL STRONG and SARAH STRONG, his wife,² of the Borough of Brooklyn of the City of New York, County of Kings and State of New York, parties of the first part, and MARGARETH BLACK, of the same place, party of the second part;

WHEREAS, the said parties of the first part are the owners in fee of the lot and premises known as No. 187 Thomas Avenue in the Borough of Brooklyn of the City of New York aforesaid, and the said party of the second part is or is about to become the owner in fee of the lot and premises known as No. 189 Thomas Avenue in the Borough of Brooklyn of the City of New York aforesaid, immediately adjoining to and on the South side of said lot of the parties of the first part; and

WHEREAS, the stable or building on the rear of said lot designated as No. 189 Thomas Avenue encroaches and stands partly upon the lot designated as No. 187 Thomas Avenue:

NOW THEREFORE, this agreement witnesseth, that in consideration of the sum of one dollar and other good and valuable considerations in hand duly paid to the said parties of the first part, the receipt whereof is hereby acknowledged, the said parties of the first part do hereby grant and convey to the said party of the second part, her heirs and assigns, the right to have said stable or building remain in its present position, encroaching or standing partly on the said lot of the parties of the first part, and the right to use during the life of such stable or building, that part of said lot of the parties of the first part upon which such stable or building encroaches or stands partly thereon, and to have such stable or building, or the wall or the part of such stable or building so encroaching or standing partly on the said lot of the parties of the first part, remain so standing during the life of such stable or building, and no longer.

IT IS FURTHER MUTUALLY AGREED between the parties hereto that no part of the fee of the soil upon which stands the stable or building, or the wall or the part of such stable or building so encroaching or standing partly on the said lot of the parties of the first part shall pass to or be vested in the said party of the second part, her heirs or assigns, by virtue of these presents.

¹ Available for protection of party whose buildings encroach on adjoining land. The form may be varied to suit the circumstances of other cases.

² Though the title is in the husband, his wife should join in the agreement. Some conveyancers require mortgagees to join also.

IN WITNESS WHEREOF, the parties to these presents have hereunto set their hands and seals the day and year first above written.

SAMUEL STRONG.

[SEAL]

SARAH STRONG.

[SEAL]

MARGARETH BLACK.

[SEAL]

In the presence of,

WILLIS T. HEFLEY.

ALLEN F. MOORE.

(Acknowledgments in proper statutory form.)

.....

CHAPTER XLI.

FORMS FOR PLEADING.¹

Form 46.—Complaint for Recovery of Broker's Commissions. Short. (First Form.)²

.....
THE CITY COURT OF BROOKLYN.

JULIUS N. KELLEY, CHARLES H. MOLTER and
FREDERICK D. KELLEY,

v.

MILTON BUCKLEY

THE PLAINTIFFS COMPLAIN:

I. That in or about February, 1910, the defendant employed the plaintiffs to find for him a purchaser of him for money or exchange of other real estate, a certain farm situate at North Leominster in the State of Massachusetts, and that thereupon the plaintiffs entered upon the said employment and worked therein, and obtained and introduced one Manning to the defendant as the purchaser of the said property, and he agreed with the defendant to purchase the said property of the defendant on the terms stated, and held out by the defendant, through the plaintiffs, and to take a deed of conveyance thereof, and the bargain was struck between the defendant and said Manning, and a contract of purchase was entered into.

II. That the value and agreed price of the said services by the plaintiffs to the defendant was and is the sum of \$750, but the defendant refuses to pay the same.

WHEREFORE, the plaintiffs pray for judgment against the defendant for the sum of \$750 with interest and costs.

JOHN J. GAYNOR,
Atty. for Plffs.

(Verified.)
.....

Form 47.—Complaint for Recovery of Broker's Commissions. Short. (Second Form.)

.....
THE CITY COURT OF BROOKLYN.

CHARLES B. RODNEY and GEORGE T. STEPHENS,

Plaintiffs,

against

JAMES BUNNELL,
Defendant.

The complaint of the plaintiff respectfully shows to this Court:

I. That at the times hereinafter mentioned the plaintiffs were, and

¹ See Chs. XXXIV and XXXV *supra*.

² See also Corbin's New Jersey Forms, No. 896.

still are, copartners in trade, as real estate agents and brokers, doing business as such in the City of Brooklyn, under the firm name and style of Rodney and Stephens.

II. That on or about the first day of April, 1910, the plaintiffs rendered certain services to the defendant at his request, as such real estate agents and brokers, in and about the selling of certain property situate on the Eastern Boulevard and Kings Highway in the Town of Utrecht, Nassau County, for which services defendant agreed to pay plaintiff two thousand dollars as commissions.

III. That no part of said sum has been paid, although payment thereof has been demanded.

WHEREFORE, plaintiffs demand judgment against the defendant for the sum of two thousand dollars with interest thereon from April 1, 1910, and costs of this action.

DOYLE & MARSHALL,
Plaintiffs' Attorneys,
Office and Post Office Address:
4 and 5 Court St., Brooklyn, N. Y.
(Duly verified.)

Form 48 — Complaint for Recovery of Broker's Compensation. (Two Counts.)¹

SUPREME COURT, COUNTY OF RICHMOND.

ALLEN R. CALLAHAN,	}
Plaintiff,	
against	
JACK M. HASKELL and WALTER N. BEARDSLEY,	
Defendants.	

COMPLAINT.

The plaintiff above named, through his attorney, Willis Clark, complains of the above-named defendants and alleges:

FOR A FIRST AND SEPARATE CAUSE OF ACTION:

I. That the plaintiff is a resident of the County of Richmond, Borough of Richmond, City of New York.

II. That the plaintiff at all times hereinafter mentioned was and still is an attorney and counselor at law duly qualified as such, with an office and place of business in the Borough of Manhattan, New York City.

III. That between the 1st day of January, 1910, and the commencement of this action, plaintiff performed professional services for said defendants at their special instance and request, and upon their promise to pay therefor, which services were reasonably worth the sum of \$3,604.38, and the plaintiff between said dates in performance of said professional services at the request of the defendants, paid out and advanced for and in behalf of said defendants, the sum of about \$1,000.

IV. That by reason of the performance of said professional services there became due to said plaintiff the sum of \$3,604.38, which sum defendants have not paid, and refuse to pay, although plaintiff has duly demanded such payment.

FOR A SECOND AND SEPARATE CAUSE OF ACTION:

I. That the plaintiff is a resident of the County of Richmond, Borough of Richmond, City of New York.

¹ This is permissible even under Code pleading. *Logan v. Whitley*, 129 App. Div. 666 (N. Y. 1908).

II. That the plaintiff, at all times hereinafter mentioned was and still is an attorney and counselor at law duly qualified as such, with an office and place of business in the Borough of Manhattan, New York City.

III. That between January 1st, 1910, and the commencement of this action, the plaintiff, Allen R. Callahan, performed services as agent and broker in causing the sale for defendants of about 4,500 acres of land, for the price of \$36,043.80, situated in Oakham township, St. Lawrence County, New York, which land was held and owned by defendants at all times herein mentioned, until about April 15, 1910.

IV. That said services were performed at the request of the defendants and for the reasonable value and agreed compensation of 10% of the selling price of said land, which sum said defendants promised and agreed to pay to the plaintiff herein.

V. That by reason of said sale there became due to the plaintiff the sum of \$3,604.38, which sum the defendants have not paid and refuse to pay, although plaintiff has duly demanded such payment.

WHEREFORE, plaintiff demands judgment against defendants for the sum of \$3,604.38 with interest from April 15, 1910, together with the costs and disbursements of this action.

WILLIS CLARK,

Attorney for plaintiff.

Office and Post Office Address:

No. 27 William St., New York City.

(Verified.)

Form 49.—Motion for Interpleader in New York City Municipal Court.¹

MUNICIPAL COURT OF THE CITY OF NEW YORK,

BOROUGH OF..... DISTRICT.

*John S. Robins and Henry A. Robins, a copartner-
ship trading under the firm name and style of
John S. Robins,*

Plaintiffs,

against

Frederick Lake,

Defendant.

ORDER TO SHOW
CAUSE.

On the annexed affidavit of *Frederick Lake* verified.....
.....and on all the papers and proceedings herein, it is
hereby

ORDERED, that the plaintiffs and *George Murray, doing business under
the name of Geo. Murray Realty Co.*² show cause before the Municipal Court
of the City of New York, Borough of.....
District, at the Court Room thereof, No..... in the Borough of.....
.....of the City of New York on theday of
.....19....at nine o'clock in the forenoon, or as soon
thereafter as counsel can be heard, why an order should not be made and
entered herein permitting the defendant to deposit with the court the sum
of \$93.75, and substituting the said *George Murray doing business under the*

¹ See Ch. XXXV. The italicized portions of this form are those which vary with the particular conditions.

² The other broker who claims the commission.

name of Geo. Murray Realty Co. in his place as a party defendant in this action, and discharging the defendant from liability to either the plaintiffs in this action or the said George Murray doing business under the name of Geo. Murray Realty Co. upon the payment into court of the said sum of \$93.75 or to such person or persons as the court may direct; and that the said George Murray doing business under the name of Geo. Murray Realty Co. be required to appear in this action to answer the complaint herein, in the same time that the defendant herein is required to answer the summons, and that the money so paid into court by the defendant herein shall be paid to the plaintiff in case of the failure of said George Murray to appear and answer, and for such other and further relief as may be just.

And it appearing that there is sufficient reason for same, service of a copy of this order and of the annexed affidavit on the said *George Murray* and on either one of the plaintiffs herein, on or before.....
19...., shall be sufficient service and notice.
Dated,.....19....

J. M. C.

Form 50.—Motion for Interpleader. Supporting Affidavit.¹

MUNICIPAL COURT OF THE CITY OF NEW YORK,

BOROUGH OF DISTRICT.

John S. Robins and Henry A. Robins, a copartnership trading under the firm name and style of John S. Robins,

Plaintiffs,

against

Frederick Lake,

Defendant.

} AFFIDAVIT.

STATE AND CITY OF NEW YORK

BOROUGH OF..... ss.:

COUNTY OF.....

*Frederick Lake, being duly sworn, says: I am the defendant above-named; the summons and complaint herein was served on me on.....
19.... and the return day thereof is.....19....*

(State the facts of the controversy, as for instance:) The action is brought to recover a commission for the exchange of certain premises which I owned on Mott Avenue, Union Terrace, Queens County, for certain premises owned by the Decker Construction Company on Perry Street, Wyckoff Park, Queens County. The plaintiff claims to be entitled to the sum of \$92.50 commission for the exchange of the aforesaid premises. A written contract for the exchange of the aforesaid premises was entered into and signed by me and the said Decker Construction Company, which contract is dated.....19.... in the presence of one George Murray, who does business under the name of Geo. Murray Realty Co. who has a real estate office at.....

..... in the Borough of..... and who makes a similar claim for commissions for the exchange of the said premises. Said George Murray is not a party to this action, and makes a demand against me for the same debt as the plaintiff, without collusion with me, and I am ready and willing to pay the aforesaid sum of \$92.50 or the sum of \$93.75, which is the proper computation of said commission, as a

¹ The italicized parts of this form are suggestive and will vary with the conditions.

commission for the *exchange* of said premises, to the person rightfully entitled thereto. I cannot safely determine to which of said claimants this money should be paid, and I am ready and willing to pay the same into court upon such terms as to costs and payments into court of the amount of said claim as may be just and directed by this court, upon my being discharged from liability to either claimant, and said *George Murray doing business under the name of Geo. Murray Realty Co.* being substituted¹ as defendant in this action in my place.

I therefore ask for an order to show cause why an order should not be made permitting me to deposit with the court the sum of \$93.75 and substituting the said *George Murray doing business under the name of Geo. Murray Realty Co.* in my place as a party defendant in this action, and discharging me from liability to either the plaintiffs in this action or to said *George Murray doing business under the name of Geo. Murray Realty Co.* or to such person or persons as the court may direct, and that the said *George Murray doing business under the name of Geo. Murray Realty Co.*, be required to appear and do appear in this action to answer the complaint therein in the same time that I am required to answer the summons, and that the money so paid into court by me shall be paid to the plaintiffs in case of the failure of the said *George Murray* to appear and answer, and for such other and further relief as may be just.

I therefore ask that the order to show cause to be made herein be made returnable on.....19.... for the reason that I have been informed by my attorney and believe that an order for an interpleader must be obtained before the return day of the summons in the action, and that service of a copy of said order to show cause and of this affidavit on the said *George Murray* and on either of the plaintiffs herein on or before....19.... shall be sufficient service and notice.

Sworn to before me this:

.....day of19....

Form 51.—Order of Interpleader.

MUNICIPAL COURT OF THE CITY OF NEW YORK,
BOROUGH OF..... DISTRICT.

John S. Robins and Henry A. Robins, a copartnership trading under the firm name and style of John S. Robins,

Plaintiffs,

against

Frederick Lake,

Defendant.

On reading and filing the affidavit of *Frederick Lake*, verified.....19.... and the order to show cause dated.....19.... with proof of the due service thereof as required by said order, and on all the papers and proceedings herein, and the plaintiffs appearing by....., their attorney, and *George Murray* appearing by....., his attorney, and after hearing....., attorney for the defendant, in support of the motion

ORDERED, that the defendant be permitted to deposit with the Clerk of this Court the sum of \$93.75 and that upon the payment of such sum as aforesaid on or before.....19.... the said *George Murray doing business under the name of Geo. Murray Realty Co.* be and he hereby is substituted as defendant in this action in the place of said defendant

Frederick Lake and that the said *Frederick Lake* be, and he hereby is thereupon discharged from liability to either the plaintiffs in this action or the said *George Murray doing business under the name of Geo. Murray Realty Co.* on account of the cause of action for which this action is brought; and it is further

ORDERED, that the said *George Murray doing business under the name of Geo. Murray Realty Co.* be, and he hereby is required to appear in this action to answer the complaint herein in the same time that the above-named defendant *Frederick Lake* is required to answer the summons, and that the money so paid into Court by the defendant *Frederick Lake*, shall be paid to the plaintiffs in case of the failure of said *George Murray* to appear and answer.

Dated,.....19....

J. M. C.

Form 52.—Complaint after Interpleader.¹

CITY COURT OF BROOKLYN.

CHARLES B. RODNEY and GEORGE T. STEPHENS,	}	SUPPLEMENTAL COMPLAINT.
Plaintiffs,		
against		
THE RIDGWAY DRIVING CLUB,		
Defendant.		

The supplemental complaint of the plaintiffs respectfully shows to this Court:

I. That at the times hereinafter mentioned, the plaintiffs were and still are copartners in trade, as real estate agents and brokers, doing business as such in the City of Brooklyn, under the firm name and style of Rodney and Stephens.

II. That on or about the first day of April, 1910, the plaintiffs rendered certain services to one James Bunnell, at his request, as such real estate agents and brokers in and about the selling of certain property situate on the Eastern Boulevard and Kings Highway in the Town of Utrecht, Nassau County, for which services the said James Bunnell agreed to pay plaintiffs the sum of \$2,000 as commissions.

III. That no part of said sum has been paid although payment thereof has been demanded.

IV. That upon application of said James Bunnell and upon notice thereof to the parties hereto, an order was made by this court dated the 19th day of July, 1910, by which it was among other things ordered that the defendant, the Ridgway Driving Club be substituted as defendant in this action in place of said James Bunnell, as by reference to said order will more fully appear.

WHEREFORE, plaintiffs demand judgment against the defendant for the sum of two thousand dollars, with interest thereon from April 1, 1910, besides the costs of this action.

DOYLE & MARSHALL,

Plaintiffs' Attorneys,

Office and Post Office Address:

4 and 5 Court St., Brooklyn, N. Y.

(Duly verified.)

¹ See Form 47 *supra*.

GENERAL INDEX.

[REFERENCES ARE TO PAGES.]

A

- Abandonment** of Broker by Customer, 135, 182, 183.
of Customer by Broker, 102, 103, 173, 174.
- Ability of Purchaser**, 161-165.
- Acceptance** of Offer, Qualified, 168.
of Proceeds Test of Principal's Liability, 262-265, 267.
- Acknowledgment of Contract of Sale**, 362.
Forms, 403, 412.
- Acreage Price**, 368.
- Actions**, 213, 321-326, 330-352. (See also Pleading.)
Forms, 440-445.
Broker's, 213, 330-340.
for Fraud, 321-326.
" Rescission, 322, 323.
- Acts of Broker**, Adverse to Principal, 59-68, 151, 152, 272, 273.
Faith of, 54-56, 59-68, 91, 150-154, 191, 192, 256-258, 272, 273. (See also Good Faith.)
Fraudulent, 50, 51, 67, 68, 91, 258, 265, 273, 292, 293, 305-309. (See also Fraud of Broker.)
Pleading, 340.
Principal Bound by, 36, 37, 267-270.
" Not Bound by, 43, 44, 47.
Ratification of, 45, 51, 52, 65, 71, 72, 109-113, 262-265, 267, 319, 320.
(See also Ratification.)
Unauthorized, 37, 45, 106-113, 267, 268, 282-286.
Which Are Not Usually Fraudulent, 291-304.
- Administrator**, Liability for Commissions, 217, 218.
Power to Make Contract of Sale, 360, 361.
Signature to Contract of Sale, 360, 361.
- Advertising by Broker**, 83, 84, 94, 134, 135.
- Agency**. (See Authority of Broker.)
Exclusive, 100, 101, 251, 252.
Forms, 426-428.
Renting, 75-77.
Sub, 70-74.
Termination of, 24, 33, 76, 79-92. (See also Termination.)

Agent. (See Broker.)

Agreements. (See also Contracts.)

Commission, 50, 63, 154, 168-170, 179, 180, 200, 201, 223-228, 235, 236, 241-248.

Forms, 426-431.

Absence of, 228-237.

As Affected by Special Conditions, 168-170, 179, 180, 200, 201.

Contingent, 243-245.

Custom as Part of, 229, 230.

Deferring Commissions, 241-248.

Enforcement of, 50.

Express, 222, 223.

for All in Excess of Fixed Price, 63, 154, 224-228, 244-246.

Rules of Real Estate Boards as Part of, 235, 236.

Special, 115, 118, 121-124, 128, 146, 170, 178, 179, 218-220, 223-228, 241-248, 338, 339.

to Wait until Title is Closed, 245-247.

Unsupported, Deferring Commissions, 241-243.

Valid, Deferring Commissions, 243.

Encroachment, 369, 370.

Forms, 436-439.

Not to be Performed within a Year, 31-35.

Oral, 34, 35, 47, 356, 357, 363, 364.

Unlawful, of Agent, 329.

Alien's Right to Make Contract of Sale, 360.

All in Excess of Fixed Price, 63, 154, 224-228, 245, 246.

Allegation of Authority, 336, 337.

of Performance, 337, 338.

Alternative Contracts, 171-173.

Amount of Commissions, 63, 154, 204, 207-209, 222-237, 245, 246.

All in Excess of Fixed Price, 63, 154, 224-228, 245, 246.

as Affected by Rules of Real Estate Boards, 235, 236.

" Fixed by Agreement, 223-228.

" " Custom, 228-237. (See also Custom.)

in Absence of Agreement, 228-237.

" " Custom, 236, 237.

Measure of, 223, 224.

on Leases, 207-209.

" Loans, 204.

When Agent is Not a Broker, 231, 232.

Application for Loan, 28.

Forms, 431-436.

Appointment as Agent, Powers Conferred by, 36-38, 43-45, 70.

Approval Clause in Contract of Sale, 377, 378.

Assertions as to Value of Property, 300-304.

Assignment of Contract of Sale, Forms, 418, 419, 424, 425.

- Authority of Broker**, 26-47, 69-92. (See also subheads.)
Forms, 426-431.
Allegation of in Complaint, 336, 337.
as to Cancellation of Contract, 46.
“ “ Third Parties after Revocation, 92.
Conferred by Appointment as Agent, 36-38, 43-45, 70, 115-117.
“ “ Instructions to Sell, 37, 115-117, 187.
Duration of, 31-35, 80-92, 147, 148.
Exclusive, 100, 101, 251, 252.
Forms, 426-428.
Extent of Ordinary, 36-45, 75-78.
Form of Authorization, 26-35.
Must be Exercised in Reasonable Time, 81-84, 147.
“ Not be Exceeded, 257, 258. (See also Unauthorized Acts.)
Naked, 80.
Oral, 26-35, 39-42, 44-47, 82.
Ratification of. (See Ratification.)
Revocation of, 79-92. (See also Termination.)
Termination of, 24, 33, 79-92. (See also Termination.)
to Collect Rents, 31, 75, 76.
“ Employ Other Brokers, 70-74.
“ Exchange Property, 29, 187.
Forms, 428.
“ Make and Endorse Negotiable Paper, 258, 259.
“ “ Contracts, 36-47, 268-270, 280-286, 360-362.
“ “ Loan, 28-30, 201, 202.
“ Purchase Property, 29-31.
“ Receive Payment for Property Sold, 70, 275-279.
“ Sell Property, 27-31.
Forms, 426-431.
“ Sign Contract for Sale of Property, 26, 27, 36-47, 269-270, 360-362.
Written, 26-34, 38-42, 44, 46, 71, 201, 202.
Availability of Purchaser, 155-165.

B

- Bad Faith of Broker**, 151, 152, 191, 192, 272, 273. (See also Fraud.)
of Principal, 81, 84-87.
Baltimore, Application for Loan, Forms, 435, 436.
Contract of Sale, Forms, 411.
Bankruptcy Terminates Agency, 87, 88.
Board of Brokers, Rules of, 235, 236.
Forms, 380-397.
Boston, Contract of Sale, Forms, 410.
Schedule of Fees, Charges and Commissions, Forms, 393, 394.

- Broker**, Abandonment of Customer by, 102, 103, 173, 174.
 Abandonment of by Customer, 182, 183.
 Acting as Middleman, 19, 20, 36, 51-56, 66, 67.
 " " Principal, 47, 61, 62, 64, 66, 67, 151, 152.
 " for Both Parties, 48-57, 66, 67, 151, 187, 272, 273. (See also Double Employment.)
 Acting for Purchaser, 125, 126, 151, 152, 220, 221.
 " " Undisclosed Principal, 70, 151, 152, 269, 270, 286-289.
 Actions by, 213, 330-340. (See also Pleading.)
 Forms, 440-442, 445.
 Acts of. (See Acts.)
 Advertising by, 83, 84, 94, 134, 135.
 Affixing Signs, 289, 290.
 Agreements with Principal. (See Agreements, Commission.)
 Application of Term, 19, 20.
 as Purchaser, 65-67.
 Authority of. (See Authority.)
 Bad Faith of, 151, 152, 191, 192, 272, 273. (See also Fraud.)
 Bankruptcy of, 87, 88.
 Combination by to Secure Secret Profits, 59, 67, 68.
 Commissions. (See Commissions.)
 Compensation. (See Commissions.)
 Complaint of, for Recovery of Commissions, 331-340. (See also Pleading.)
 Concealment of Facts by, 258, 293-296.
 Contracts of. (See Contract; also Agreements.)
 Corporation as, 24.
 Corrupt Influencing of, 68, 329.
 Death of, 90.
 Definition of, 19, 20, 43.
 Double Employment of, 48-57, 66, 67, 151, 187, 272, 273. (See also Double Employment.)
 Duty of to Principal. (See Duty of Broker.)
 Effort Required of, 130, 131.
 Employees of, 63.
 Employment of. (See Employment.)
 Exclusive, 100, 101, 251, 252.
 Forms, 426-428.
 Failure of Efforts. (See Failure.)
 Fraud of. (See Fraud.)
 Function of, 20.
 General Rule as to Discretion, 54-56.
 Good Faith of, 49, 54-56, 59-68, 150-154, 256-258, 272, 273, 339-340. (See also Good Faith.)
 Insurance, 77, 78.
 Introduction of Purchaser by, 94, 95, 133, 134.

Broker—Continued.

Liability of. (See Liability.)

License to Act as, 24, 25, 78.

Married Woman as, 22, 23.

May be Personally Interested with Consent of Principal, 65, 66.

Minor as, 24.

Misfeasance of, 277-279.

Misrepresentations by, 258, 260-265, 274, 305-309. (See also Fraud.)

Must Act in Interest of Principal, 48, 59-68, 150-153, 256, 257.

“ be Procuring Cause of Sale, 114-140. (See also Procuring Cause.)

“ Disclose Relevant Information to Principal, 154, 258.

“ Not be Personally Interested, 59-68, 151, 152, 272.

“ Not Exceed Authority, 257, 258. (See also Unauthorized Acts.)

“ Secure Best Offer Possible, 49, 152, 153.

Negligence of, 278, 279.

Non-Feasance of, 277-279.

Notice to as Notice to Principal, 270-273.

Partnership as, 24, 271,

Pleading Acts Done by, 340.

Powers of. (See Authority.)

Presence at Consummation of Sale Not Necessary, 94, 95, 131, 132.

Ratification of Acts of. (See Ratification.)

Relations of Principal to, 250-254.

“ “ to Principal, 255-259. (See also Relations.)

Renting, 75-77.

Representing Purchaser, 125, 126, 151-152, 220, 221. (See also Double Employment.)

Revocation of Authority, 79-92. (See also Termination.)

Secret Profits of, 59-68, 151, 152, 272.

Signature to Contract, 46, 47, 360-362.

Silence of Not Usually Fraudulent, 293-296.

Termination of Agency, 24, 33, 76, 79-92. (See also Termination.)

“ “ “ by, 33, 80, 84.

Unauthorized Acts of, 37, 45, 106-113, 267, 268, 282-280.

Unlawful Agreements of, 329.

“ Intrusion on Real Property by, 289, 290.

Usury of, 274.

Volunteer, 105-113, 231, 232.

Who May Act as, 22-25.

With Discretion, 52-56, 66, 67, 151, 187.

Without Discretion, 51-56, 66, 67.

Brooklyn, Schedule of Fees, Charges, and Commissions, Forms, 381, 382.

Burden of Proof as to Broker's Good Faith, 68.

as to Principal's Knowledge of Double Employment, 51.

“ “ Purchaser's Financial Ability, 164, 165.

C

- California, Broker's Authority to Purchase and Sell, 29.**
 Broker's Authority to Sign Contract of Sale, 41.
- Cancellation of Contracts, 46.**
- Caution, Degree Required of Vendee, 313-316.**
- Change of Mind by Vendor, 129, 159, 168-170, 244, 246-248, 254.**
- Change of Terms, 95, 142-147, 157, 168, 169, 171.**
 Acceptance by Owner of, 95, 144, 145.
 after Acceptance by Purchaser, 142, 143.
- Charges, Schedules of, Forms, 380-397.**
- Chicago, Agent's Contract of Sale, Forms, 414.**
 Application for Loan, Forms, 432, 433.
 Contract of Exchange, Forms, 421-423.
 " " Sale, Forms, 404-408, 414.
 Exclusive Agency Contract, Forms, 427, 428.
 Schedule of Fees, Charges and Commissions, Forms, 382-386.
- Claims for Commissions, Double, 95-101, 341-352. (See also Interpleader.)**
- Closing of Title, 376.**
- Collection of Rents, 31, 75, 76.**
- Combination for Secret Profits, 59, 67, 68.**
- Commissions, 93-249. (See also subheads.)**
 Agreements for. (See Agreements.)
 All in Excess of Fixed Price, 63, 154, 224-228, 245-246.
 Alternative Contracts of Sale do Not Defeat, 171-173.
 Amount of, 63, 154, 204, 207-209, 222-237, 245, 246. (See also Amount.)
 as Affected by Abandonment by Broker, 102, 103, 173, 174.
 " " " Broker's Bad Faith, 151, 152, 191, 192, 272, 273.
 " " " Custom, 74, 228-237.
 " " " Defective Title, 177-179, 182, 184, 188-192, 194-201, 244, 246-248.
 " " " Failure of Broker's Efforts, 85, 102, 103, 127-129, 135, 173, 174, 252-254.
 " " " Fraud of Principal, 213.
 " " " Misrepresentations by Vendor, 183, 184, 201.
 " " " Provisional Contract of Sale, 158, 173.
 " " " Promises to Pay, 51, 52, 54, 126, 127, 213, 214, 219, 220.
 " " " Rules of Real Estate Boards, 235, 236.
 " " " Special Agreement. (See Special Agreements.)
- Complaint for Recovery of, 331-340. (See also Pleading.)**
 Forms, 440-442, 445.
- Completed Transaction Necessary, 117-125, 166-174.**
- Conveyance of Property Not Necessary for, 170.**
- Deferred, 241-248.**
- Division of, 59, 60, 70-74, 230.**

Commissions—Continued.

Double Claims for, 95-101, 341-352. (See also Interpleader.)

Due, Time When, 238-249.

as Affected by Agreements to Defer, 241-248.

“ “ “ “ “ Wait until Title is Closed, 245-247.

“ “ “ Contingent Commission Agreements, 243-245.

“ “ “ Defective Title, 247, 248.

“ “ “ Unsupported Agreements Deferring Commissions, 241-243.

“ “ “ Valid Agreements Deferring Commissions, 243.

Earned,

Presence of Broker Not Necessary for, 131, 132.

Production of Purchaser Sufficient for, 115-122, 141, 142.

Requirements of, 94-104, 117-125, 130-134, 166-174, 240-242.

Contract of Sale Necessary, 115, 117-125, 166, 170, 171.

Contract of Sale Not Necessary, 166, 170.

Delivery of Deed Required, 119.

When, 87, 94, 95, 114-140, 186, 193-203, 205-211, 238-249.

for Unsuccessful Efforts, 127-129.

in Absence of Agreement, 228-237.

Introduction of Purchaser Not Necessary for, 94, 95, 133, 134.

Liability for. (See Liability.)

Measure of, 223, 224.

Methods of Earning, 114, 115.

Not Defeated by Change of Terms, 95, 142-147, 157, 168, 169, 171.

“ “ “ Failure of Purchaser, 120, 181-184.

“ “ “ Failure of Principal. (See Failure.)

“ “ “ Failure of Tenant, 208-211.

“ “ “ Interference of Principal, 135, 139, 227, 228, 251-253.

“ “ “ Wife's Refusal to Sign Deed, 118, 177.

Not Earned if Broker is Not Procuring Cause. (See Procuring Cause.)

on Exchanges of Property, 50, 51, 59, 60, 185-192, 228, 229. (See also Exchange.)

“ Installment Sales, 248, 249.

“ Leases, 205-211, 230, 236. (See also Leases.)

“ Loans, 193-204. (See also Loans.)

“ Options, 158, 159.

“ Rentals, 75, 76.

“ Sales Affected by Advertising, 83, 84, 134, 135.

Payment of. (See Payment.)

Purchaser's Responsibility for, 183, 218-221.

Recovery of. (See Recovery; also Pleading.)

Rule as to. (See Rule.)

Sale must be on Employer's Terms, 141-147, 156-158, 167-169, 202, 203.

Schedules of, Forms, 380-397.

Sharing, 59, 60, 70-74, 230.

Commissions—Continued.

Subagents', 70-74.

Volunteers', 105-107, 231, 232.

Waiver of by Broker, 168, 224.

When Agent is Not a Broker, 231, 232.

“ Broker Acts for Both Parties, 50-57, 66, 67, 151, 187, 272, 273.

“ Principal is Undisclosed, 151, 152.

“ Sale is Consummated by Another Broker, 135-137.

“ “ “ “ Principal, 100-102, 137-140, 251-254.

“ Several Brokers are Employed, 95-101, 135-137.

Compensation. (See Commissions.)

Agreed, 223-228.

Amount of. (See Amount.)

Complaint for Recovery of Commissions, 331-340. (See also Pleading.)

Forms, 440-442, 445.

after Interpleader, Forms, 445.

Completed Transaction, Necessary to Commissions, 117-125, 166-174.**Completeness of Transaction, as Affected by Change of Terms, 168, 169, 171.**

as Affected by Special Conditions, 168-170.

Concealment, by Broker, 258, 293-296.

by Principal, 293-298.

“ Purchaser, 296-298.

Conspiracy, 67, 68, 325, 328, 329.

Proof of, 325.

Punishment of, 328, 329.

Consummation of Sale by Another Broker, 86, 135-137.

by Principal, 100-102, 137-140, 251-254.

Contingent Commission Agreements, 243-245.**Contract.** (See also Agreements.)

Action Based Upon, 334-340. (See also Pleading.)

Cancellation of, 46.

Commission. (See Agreements.)

Compelling Execution of, 327, 328.

Encroachment, 369, 370.

Forms, 436-439.

Executed for Undisclosed Principal, 47, 287-289.

Liability of Agent for Improper, 280-282, 329.

“ “ “ “ Unauthorized, 281-286.

“ “ Principal for Agent's, 46, 47, 268-270.

of Corporation, 47, 360-362.

“ Employment, 26-34, 39-42, 49, 50, 73, 74, 223-228, 243-245.

Forms, 426-431.

Double Employment a Breach of, 49, 50.

“ Married Woman, 22, 23.

“ Salesman, Forms, 429-431.

Contract—Continued.

Unauthorized, 281-286.

Under Seal, 40, 46, 47, 269, 270, 334.

Contracts for Exchange of Property, 170, 171, 187-192.

Forms, 419-423.

Contracts for Sale of Property, 353-379. (See also subheads.)

Forms, 398-425.

Acknowledgment of, 362.

Forms, 403, 412.

Agent's Sale, Forms, 414.

Alternative, 171-173.

Approval Clause in, 377, 378.

as Affected by Statute of Frauds, 38, 39, 356, 357.

Assignment of, Forms, 418, 419, 424, 425.

Covenants and Restrictions in, 368-370.

Demand for Performance of, Forms, 425.

Description of Property in, 364-366.

Drafting, 355, 356.

Enforcement of, 46, 47.

Essential Features of, 358, 359.

Execution of, 46, 47, 280-289, 360-362.

General Provisions in, 378, 379.

Informal, 356, 357.

Deposit to Bind, 356, 357.

Installment Plan, Forms, 415-418.

Leased Property, 370, 371.

Liability Under in Case of Fraud, 322, 323.

Made by Broker, 36-47, 268-270, 280-286, 360-362.

Cancellation or Surrender of, 46.

Enforcement of, 46, 47.

in Broker's Own Name, 47.

Ratification of, 45, 319, 320.

Signature to, 46, 47. (See also Signing.)

Necessary to Entitle Broker to Commissions, 115, 117-125, 166, 170, 171.

Not Necessary to Entitle Broker to Commissions, 166, 170.

Oral, 34, 35, 356, 357.

“ Understandings as to, 363, 364.

Parties to, 359, 360.

Power to Make,

of Administrator, 360, 361.

“ Alien, 360.

“ Broker, 36-47, 268-270, 360-362.

“ Business Corporation, 47, 360-362.

“ Executor, 360, 361.

“ Guardian, 360, 361.

“ Party Not an Owner, 215, 216, 360.

Contracts for Sale of Property—Continued.

Power to Make, Trustee's, 360, 361.

Provisional, 158, 173.

Recitals in Not Waiver of Fraud, 320, 321.

Rescission of, 311, 318-326.

Restricted Lots, Installment Plan, Forms, 415, 416.

Signatures to, 46, 47, 360-362. (See also Signing.)

Special Clauses in, 366, 377, 378.

Statement in as to Easements, 365, 368-370.

“ “ “ “ Encroachments, 368-370.

“ “ “ “ Fixtures, 376, 377.

“ “ “ “ Gross or Acreage Price, 368.

“ “ “ “ Incumbrances, 365, 368-370.

“ “ “ “ Manner of Payment, 371-373.

“ “ “ “ Mortgages, 371-373.

“ “ “ “ New Buildings, 375.

“ “ “ “ Ownership in Adjacent Streets, 366-368.

“ “ “ “ Price, 371-373.

“ “ “ “ Restrictions, 368, 369.

“ “ “ “ Time for Delivery of Deed, 375, 376.

Suburban Property, 373-375.

Unauthorized, 280-286.

under Seal, 40, 46, 47, 269, 270.

Vitiated by Material Fraud, 292.

Conversion of Money by Broker, 259.**Conveyance of Property Not Necessary for Commissions, 170.****Cook County, Illinois, Agent's Sale Contract, Forms, 414.**

Contract of Sale, Forms, 400-403, 414.

Exclusive Agency Contract, Forms, 427, 428.

Schedule of Fees, Charges and Commissions, Forms, 387-391.

Corporation as Broker, 24.

Power to Make Contract of Sale, 360.

Signature to Contract of Sale, 47, 361, 362.

Covenants and Restrictions in Contract of Sale, 368-370.**Criminal Fraud, 327-329.**

Compelling Execution of Instrument, 327, 328.

Conspiracy, 67, 68, 325, 328, 329.

Corrupt Influencing of Agent, 68, 329.

Extortion, 328.

Obtaining Property by False Pretenses, 327.

Punishment for, 328, 329.

Unlawful Agreements of Agents, 329.

Custom, as Affecting Commissions, 74, 228-237.

Absence of, 236, 237.

as Affected by Rules of Real Estate Boards, 235, 236.

“ Part of Agreement, 229, 230.

Custom—Continued.

- Binding upon Parties, 230-232.
- Evidence of, 75, 231, 233-235.
- for Division of Commissions, 230.
- How Established, 230, 232, 233.
- Ignorance of, 232, 233.

Customer. (See Purchaser.)

D

Damages, Liquidated, 171-173.

Measure of in Case of Fraud, 321.

Death of Broker, 90.

of Principal, 76, 90, 91.

Deed, Delivery of, 119, 375, 376.

Deed and Money, Forms, 423, 424.

Defective Title, 177-179, 182, 184, 188-192, 194-201, 244, 246-248.

Defense in Pleading, Matters of, 56, 57, 174, 339, 340.

Deferred Commissions, 241-248.

Delivery of Deed, 119, 375, 376.

Demand for Performance of Contract of Sale, Forms, 425.

Denver, Schedule of Fees, Charges and Commissions, Forms, 397.

Deposit to Bind Informal Contract, 356, 357.

Description of Property in Contract of Sale, 364-366.

Destruction of Property Terminates Agency, 87.

Disclosure of Information, 154, 258, 295, 296.

of Purchaser to Principal, 159-161.

Waiver of Right to, 160, 161.

Discretion, Broker With, 52-56, 66, 67, 151, 187.

Broker Without, 51-56, 66, 67.

General Rule as to, 54-56.

Dispossession of Tenant, 76, 77, 211.

Division of Commissions, 59, 60, 70-74, 230.

Double Claims for Commissions, 95-101, 341-352. (See also Interpleader.)

Double Employment, 48-57, 66, 67, 151, 187, 272, 273.

Broker with No Discretion May Act for Both Parties, 51-56.

General Rule as to Discretion, 54-56, 151.

in Exchanges of Property, 50, 51, 66, 67, 187.

Not Unlawful in Itself, 52-56.

Pleading, as a Defense, 56, 57.

Ratification of, 51, 52.

With Knowledge of Principals, 51, 52, 273.

Without Knowledge of Principals, 49-51.

Drafting Contract of Sale, 355-379.

Due, When Commissions Are, 238-249. (See also Commissions.)

Duration of Broker's Authority, 31-35, 80-92, 147, 148.
Duty of Broker to Principal, 38, 48-50, 55, 59, 60, 75, 115-117, 130, 131, 175-177, 255-258.

E

Earned Commissions. (See Commissions.)
Easements, 365, 368-370.
Employees of Broker, 63.
Employer. (See Principal; also Purchaser.)
Employment of Broker, 36-57, 66, 67, 105-113, 186, 201, 202, 207, 213, 214, 220, 221. (See also subheads.)
 by a Broker, 70-74.
 " Purchaser, 125, 126, 151, 152, 220, 221.
 Contract of, 26-34, 39-42, 49, 50, 73, 74, 223-228, 243-245.
 Forms, 426-431.
 Double, 48-57, 66, 67, 151, 187, 272, 273. (See also Double Employment.)
 Implied, 111-112.
 Manner of, 108.
 Must be by Owner or His Authorized Agent, 108, 109.
 of More than One, 95-101, 135-137, 250, 251, 341-344.
 Powers Conferred by, 36-38, 43-45, 70, 115-117.
 Ratification Equivalent to, 109-113.
 Termination of, 24, 33, 76, 79-92. (See also Termination.)
 Time of, 31-35, 80-84, 147, 148.
Encroachments, 368-370.
 Agreements for, 369, 370.
 Forms, 436-439.
Enforcement of Commission Contract, 50.
 of Contract of Sale Made by Broker, 46, 47.
Equity Suits, Interpleader Makes Actions at Law, 351, 352.
Essential Features of Contract of Sale, 358, 359.
Evidence. (See Proof.)
Exchange of Property, 185-192. (See also subheads.)
 Authority of Broker to Effect, 29, 187.
 Forms, 428.
 Commissions on, 50, 51, 59, 60, 185-192, 228, 229.
 as Affected by Broker's Bad Faith, 191, 192.
 " " " Defective Title, 188-192.
 Conflicting Decisions as to when earned, 185, 186.
 from Both Parties, 187.
 Rule when Contract has been Executed, 187-192.
 When Earned, 186.
 Contracts for, 170, 171, 187-192.
 Forms, 419-423.
 Defeated by Defective Title, 192.
 Double Employment in, 50, 51, 66, 67, 187.

Exclusive Agency, 100, 101, 251, 252.

Forms, 426-428.

Execution of Contract by Broker, 47, 280-289.

of Contract of Sale, 46, 47, 280-289, 360-362.

Executor, Liability of for Commissions, 217, 218.

Power of to Make Contract of Sale, 360, 361.

Signature of to Contract of Sale, 360, 361.

Exercise of Caution Required of Vendee, 311-316.

Extent of Broker's Ordinary Authority, 36-45, 75-78.

Extortion, 328.

F

Facts Constituting Cause of Action, Pleading, 333-337.

Failure of Broker's Efforts, 75, 81, 85, 102, 103, 127-129, 135, 173, 174, 252-254.

Caused by Principal's Interference, 135.

Liability for, 75, 148, 149.

Rights of Principal after, 102, 103, 135, 173, 174, 252-254.

of Customer to Complete Sale, 120, 135, 181-184.

Caused by Customer's Abandonment of Broker, 135, 182, 183.

“ “ Misrepresentations of Vendor, 183, 184.

General Rule as to, 181, 182.

of Lease, 208-211.

“ Principal to Complete Loan, 194-201, 203, 204.

“ Principal to Complete Sale, 103, 117, 120, 126, 129, 159, 167-170, 175-180, 182-184, 188-192, 244, 246-248, 254.

Caused by Defective Title, 177-179, 182, 188-192, 244, 246-248, 254.

“ “ Refusal of Vendor, 120, 126, 159, 167-170, 254.

“ “ “ “ Vendor's Wife, 118, 177.

General Rule as to, 176, 177.

Special Causes for, 179, 180.

False Pretenses, Obtaining Property by, 327.

False Representations, 258, 260-265, 274, 296-317. (See also Misrepresentations; also Fraud.)

Fees. (See Commissions.)

Schedules of, Forms, 380-397.

Financial Ability of Purchaser, 161-165.

Burden of Proof as to, 164, 165.

Need Not be Shown, 162, 163.

First Mortgages, 372, 373.

Fixed Price, All in Excess of, 154, 224-228, 245, 246.

Fixtures, 376, 377.

Forfeit Money, 245.

Fraud, 291-329. (See also subheads.)

Acts Not Usually Considered a, 291-304.

Assertions and Opinions as to Value, 300, 301.

Fraud—Continued.

Acts Not Usually Considered a,—Continued.

Promises, Hopes, etc., 298, 299.

Silence and Concealment, 293-298.

Assertions and Opinions as to Value, 301-304.

Contract of Sale Vitiating by Material, 292.

Criminal, 67, 68, 325, 327-329. (See also Criminal Fraud.)

False Representations, 258, 260-265, 274, 296-298, 301-317.

Liability on Contract in Case of, 322, 323.

Negligence of Vendee No Bar to Relief, 316, 317.

of Broker, 50, 51, 59, 60, 64, 67, 68, 91, 258, 260-265, 273, 292, 293, 305-309, 318-321.

Concealment of Material Facts from Principal, 258.

Double Employment Without Knowledge of Principals, 50, 51.

Pleading, 265.

Termination of Agency by, 91.

Waiver of, 318-321.

of Principal, 213, 260, 314, 316, 317.

“ Vendee, 296-298.

Pleading, 265, 324-326.

Proof of, 325, 326.

Remedies for, 321-326.

Rescission in Case of, 318-326.

Statute of, 26, 31-35, 38, 39, 45, 356, 357. (See also Statute of Frauds.)

What Constitutes, 291, 292.

When Concealment is a, 296-298.

Functions of Broker, 20.**G**

Good Faith of Broker, 49, 54-56, 59-68, 91, 150-154, 256-258, 272, 273, 339, 340.

Broker Not Required to Establish, 151, 339, 340.

Double Employment Not, 55, 56, 151.

Requirements of, 54-56, 59-68, 150-154, 256-258, 272, 273.

Revocation of Agency Must be in, 81, 84-87.

Gross or Acreage Price of Property, 368.

Guardian, Liability for Commissions, 217, 218.

Power to Make Contract of Sale, 360, 361.

Signature to Contract of Sale, 360, 361.

H

Hopes, Expression of, 298, 299.

I

Ignorance of Custom, 232, 233.

Illinois, Authority of Broker to Sign Contract of Sale, 41, 42.

Improper Contracts, Broker's Liability for, 280-282, 329.
Improvements, 75.

Misrepresentations as to, 308.

Incidental Power to Contract, Broker's, 44, 45.

Increase of Price of Property, 146, 147.

Incumbrances, 365, 368-370.

Information, Disclosure of by Broker, 154, 258, 293-296.

Vendor's Duty to Give, 311, 312.

Insanity Terminates Agency, 88-90.

Installment Sales, Commissions on, 248, 249.

Contracts for, Forms, 415-418.

Instructions to Sell Property, Power Conferred by, 37, 115-117, 187.

Insurance Brokers, 77, 78.

Interference of Principal in Broker's Negotiations, 135, 139, 227, 228, 251-253.

Interpleader, 341-352. (See also Pleading.)

Forms, 442-445.

Complaint after, Forms, 445.

Method of Procedure, 348-351.

Nature of, 344.

Requisites of, 351, 352.

When Permissible, 345-348.

Intervention of Principal. (See Interference.)

Introductions, 94, 95, 133, 134.

Intrusion on Real Property, 289, 290.

J

Jersey City, Schedule of Fees, Charges and Commissions, Forms, 395, 396.

Joint Interest in Property, 213.

Severance of Revokes Agency, 87.

K

Knowledge, Principal Chargeable with Broker's, 270-273.

L

Law Day, The, 376.

Law, Proof of Fraud at, 325, 326.

Leases, 125, 370, 371.

Commissions on, 205-211, 230, 236.

Amount of, 207-209.

as Affected by Dispossession of Tenant, 211.

" " " Failure of Lease, 208-211.

General Requirements for Recovery of, 206, 207.

Tenant's Liability for, 207.

When Earned, 205-211.

Legal Effect, Pleading, 332, 333.

Liability of Broker, 260-265, 275-290. (See also subheads.)

for Affixing Signs, 289, 290.

“ Contracts Executed by Him, 37, 280-289.

“ Conversion of Money, 259.

“ Defective Title, 177-179.

“ Exceeding Authority, 257, 258, 282-286.

“ Failure to Rent, 75.

“ “ “ Sell, 148, 149.

“ Fraud, 68, 260-263.

“ Improper Contracts, 280-282, 329.

“ Misfeasance and Non-feasance, 277-279.

“ Misrepresentations, 260-265.

“ Moneys Received, 275-277.

“ Negligence, 278, 279.

“ Secret Profits, 68.

“ Unauthorized Acts, 106-113, 282-286.

“ “ “ Contracts, 281-286.

“ Unlawful Intrusion on Property, 289, 290.

to Third Parties, 275-290.

When Principal is Incapable, 281.

“ “ “ Non-existent, 280, 281.

“ “ “ Undisclosed, 286-289.

Liability of Joint Employers for Commissions, 213.

of Persons Sharing Profits, 68.

of Principal, 212-221, 260-265. (See also subheads.)

Acceptance of Proceeds Test of, 262-265, 267.

for Agent's Contracts, 46, 47, 268-270.

“ Broker's Representations, 261-265, 274, 305, 306.

“ “ “ Wrongdoing, 267.

for Commissions, 81, 95-102, 183, 212-221.

as Affected by Fraud, 213.

“ “ “ Promises to Pay, 213, 214.

to Exclusive Agent, 101.

When Negotiating Sale, 101, 102.

When Not Owner of Property, 214-218.

for Misrepresentations, 260.

“ Notice to Agent, 270-273.

to Third Parties, 266-274.

When Undisclosed, 47, 269, 270.

of Purchaser for Commissions, 183, 218-221.

“ Tenant for Commissions, 207.

“ Trustees, Executors and Administrators for Commissions, 217, 218.

on Contract in Case of Fraud, 322, 323.

License to Act as Broker, 24, 25, 78.

Liquidated Damages, 171-173.

Loans, 28-30, 125, 193-204.

Authority to Negotiate, 28-30, 201, 202.

Application for, 28.

Forms, 431-436.

Commissions on, 193-204.

as Affected by Defective Title, 194-201.

" " " Failure of Principal, 194-201, 203, 204.

" " " Misrepresentations of Principal, 201.

" " " Refusal of Principal, 203, 204.

" " " Special Conditions, 200, 201.

Employment Requisite to, 201, 202.

Not Earned unless Principal's Terms are Met, 202, 203.

Recovery of, 203, 204.

When Earned, 193-203.

New York Rule, 194-196.

Rule in Other States, 196-200.

Location of Property, Misrepresentations as to, 308.**Lots, Restricted, 368, 369.**

Forms, 415, 416.

M**Manner of Payment for Property, 371-373.****Maps of Suburban Property, 373-375.****Married Women as Brokers, 22, 23.****Massachusetts, Broker's Authority to Sign Contract of Sale, 41.****Measure of Broker's Compensation, 223, 224.****Methods of Closing Sale, 354-356.**

of Describing Property, 364-366.

" Earning Commissions, 114, 115.

" Pleading, 332.

Middleman, Broker as, 19, 20, 36, 51, 56, 66, 67.**Minnesota, Broker's Authority to Sign Contract of Sale, 42.****Minors as Brokers, 24.****Misfeasance, Agent's Liability for, 277-279.****Misrepresentations, 258, 260-265, 274, 296-298, 301-317.**

by Broker, 258, 260-265, 274, 305-309.

Liability of Principal for, 261-265, 274, 305, 306.

by Principal, 183, 184, 201, 260, 313-316.

" Vendee, 296-298.

Missouri, Broker's Authority to Make Loans, 30.

" " " Sell, 29, 30.

Money, Conversion of by Broker, 259.

Deed and, Forms, 423, 424.

Forfeit, 245.

Received, Liability of Broker for, 275-277.

Montana, Broker's Authority to Purchase or Sell, 31.

Mortgages, 371-373.

First, 372, 373.

Misrepresentations as to, 308.

Purchase Money, 372, 373.

Second, 372, 373.

Motion for Interpleader, Forms, 442-444.**N****Nebraska, Broker's Authority to Sell, 30, 31.****Negative Easements, 368-370.****Negligence, Broker's Liability for, 278, 279.**

of Vendee, 310-317.

No Bar to Relief against Wilful Fraud, 316, 317.

Omission of Due Caution, 312-316.

" " Investigation, 312.

Reliance upon Statement of Vendor, 310, 311.

Negotiable Paper, Broker's Power as to, 258, 259.**Net Price of Property, 63, 224-228, 245, 246.****New Jersey, Broker's Authority to Negotiate Sale or Exchange, 29.**

Broker's Authority to Sign Contract of Sale, 40, 41.

Contract of Sale, Forms, 412, 413.

New York, Broker's Authority to Make Loan, 28, 29.

Broker's Authority to Sell, 27, 28.

" " " Sign Contract of Sale, 39, 40.

Rule as to Commissions on Loans, 194-196.

Statute of Frauds, 33-35.

New York City, Application for Loan, Forms, 431, 432.

Contract of Exchange, Forms, 419, 420.

" " Sale, Forms, 398-400.

Schedule of Fees, Charges and Commissions, Forms, 380, 381.

Non-feasance, Broker's Liability for, 277-279.**Non-Performance, Pleading Excuse for, 337, 338.****North Dakota, Broker's Authority to Sign Contract of Sale, 42.****Notice to Agent, 270-273.**

of Death of Principal Not Necessary, 90.

of Revocation, 92.

When Notice to Principal, 270, 271, 273.

" Not Notice to Principal, 271-273.

" Principal is Chargeable with Agent's Knowledge, 270-273.

O**Obligations of Broker to Principal. (See Duty of Broker.)****Opinions as to Value, When Fraudulent, 301-304.**

When Not Fraudulent, 300-301.

[References are to pages.]

- Oral Agreements**, 34, 35, 47, 356, 357, 363, 364.
 - Authorization of Broker, 26-35, 39-42, 44-47, 82.
- Option**, 86, 171-173, 214, 215, 357, 358.
 - Not a Previous Sale, 86.
 - Not a Sale, 158, 171, 172.
 - Without Consideration, 358.
- Order of Interpleader**, Forms, 444, 445.
- Owner**. (See Principal.)
- Ownership in Streets Adjacent to Property**, 366-368.

P

- Parties to Contract of Sale**, 359, 360.
- Partnership as Brokers**, 24, 271.
- Party Walls**, 365.
- Payment for Property**, 371-373.
 - Agent's Power to Receive, 70, 275-277.
 - by Installment, Forms, 415-418.
 - to Agent as Payment to Principal, 276, 277.
- of Commissions,
 - by Purchaser, 218-221.
 - on Installment Sales, 248, 249.
 - Promises for, 51, 52, 54, 126, 127, 213, 214, 219, 220.
- Performance of Contract of Sale**, Demand for, Forms, 425.
 - Pleading Full, 337, 338.
 - Terminates Agency, 79, 80.
 - Time of, 31-35, 80-84, 147, 148.
- Philadelphia**, Contract of Sale, Forms, 408, 409.
 - Schedule of Fees, Charges and Commissions, Forms, 392.
- Pleading**, 330-352. (See also Interpleader.)
 - Forms, 440-445.
 - Action Based upon a Contract, 334-340.
 - Acts Done by Agent, 340.
 - Authority of Broker, 336, 377.
 - Change of after Litigation is Begun, 180.
 - Complaint after Interpleader, Forms, 445.
 - “ for Broker's Commissions, 331-340.
 - Forms, 440-442, 445.
 - Double Employment, 56, 57.
 - Facts Constituting Cause of Action, 333-337.
 - “ to be Stated, 335-337.
 - Fraud of Agent, 265, 324-326.
 - When Committed by More than One, 324, 325.
 - Full Performance and Excuse for Non-Performance, 337, 338.
 - Legal Effect, 332, 333.
 - Matters of Defense, 56, 57, 174, 339, 340.
 - Methods of, 332.
 - Special Agreements, 338, 339.

- Powers, Authority and Rights of Broker.** (See Authority.)
- Presence of Broker at Consummation of Sale,** 94, 95, 131, 132.
- Previous Sale, Option Not a,** 86.
- Termination of Agency by, 86, 87.
- Price of Property,** 368, 371-373. (See also subheads.)
- Agent Must Secure Best Possible, 49, 152, 153.
- All in Excess of Fixed, 63, 154, 224-228, 245, 246.
- Gross or Acreage, 368.
- Increase of, 146, 147.
- Net, 63, 224-228.
- Paid, Misrepresentations as to, 305, 306.
- Requirements as to, 145-147.
- Procuring Cause of Sale, Broker as,** 114-140. (See also subheads.)
- Contract of Sale Necessary, 115, 117-125, 166, 170, 171.
- " " " Not Necessary, 166, 170.
- Degree of Effort Required of Broker, 130, 131.
- Delivery of Deed Requisite, 119.
- Effect of Change of Terms, 142-145.
- " " Promises to Pay Commissions, 126, 127.
- " " Special Agreements, 118, 121-124.
- General Rule as to, 124, 125, 238-240.
- Good Faith of Broker Necessary, 150-153.
- Introduction of Purchaser Not Necessary, 94, 95, 133, 134.
- Presence of Broker at Sale Not Necessary, 131, 132.
- Production of Purchaser Sufficient, 115-122, 141, 142.
- Sale Must be on Employer's Terms, 141-147.
- When Broker Represents Purchaser, 125, 126.
- " Sale is Made by Principal, 100-102, 137-140, 251-254.
- Profits, Secret,** 58-68, 151, 152, 272. (See also Secret Profits.)
- Promises, Hopes, etc.,** 298, 299.
- Promises to Pay Commissions,** 51, 52, 54, 126, 127, 213, 214, 219, 220.
- Effect of, 51, 52, 126, 127, 213, 214.
- Purchaser's, 219, 220.
- Proof of Conspiracy,** 325.
- of Custom, 75, 231, 233-235.
- " Financial Ability of Purchaser, 164, 165.
- " Fraud, 325, 326.
- Property,**
- Contracts for Sale of. (See Contracts.)
- Conveyance of not Necessary for Commission, 170.
- Description of in Contract of Sale, 364-366.
- Destruction of Terminates Agency, 87.
- Easements on, 365, 368-370.
- Encroachments on, 368-370.
- Exchange of. (See Exchange.)
- Fixtures on, 376, 377.

Property—Continued.

- Improvements on, 75.
- Incumbrances on, 365, 368-370.
- Intrusion on, 289, 290.
- Leases on, 125, 205-211, 230, 236, 370, 371.
- Misrepresentations as to, 260-265, 274, 296-298, 302, 303, 305-317.
- Mortgages on, 371-373.
- Obtained by False Pretenses, 327.
- Opinions as to Value of, 300-304, 306.
- Options on, 86, 158, 171, 172, 214, 215, 356-358.
- Ownership of Streets Adjacent to, 366-368.
- Party Walls on, 365.
- Payment for, 70, 275-277, 371-373.
- Price of. (See Price.)
- Purchase of, 29-31. (See also Purchaser; also Sale.)
- Restrictions on, 368, 369.
- Sale of. (See Sale.)
- Signs on, 289, 290.
- Suburban, 373-375.
- Title to, 309.

Provisional Contracts of Sale, 158, 173.**Provisions, General, in Contract of Sale, 378, 379.****Punishment for Conspiracy, 328, 329.**

for Criminal Fraud, 328, 329.

Purchase Money Mortgage, 372, 373.**Principal. (See also Purchaser.)**

Agreements with Broker. (See Agreements; also Contracts.)

Bankruptcy of, 87, 88.

Bound by Broker's Acts, 36, 37, 267-270.

Broker as, 47, 61, 62, 64, 66, 67, 151, 152.

“ Must be Employed by, 108, 109.

Broker's Obligations to. (See Duty of Broker.)

Concealment by, 293-298.

“ of Material Facts from, 258.

Death of, 76, 90, 91.

Definition of, 21.

Duty to Volunteer Information, 311, 312.

Employment of Several Brokers by, 95-101, 135-137, 250, 251, 341-344.

Failure of, to Complete Loan, 194-201, 203, 204.

“ “ “ Complete Sale, 103, 117, 120, 126, 129, 159, 167-170, 175-180, 182-184, 188-192, 244, 246-248, 254.

Fraud of, 213, 260, 314, 316, 317.

Good Faith of, 81, 84-87.

Incapable, 281.

Insanity of, 88-90.

Intervention of, 135, 139, 227, 228, 251-253.

Principal—Continued.

Liability of. (See Liability.)

Misrepresentations by, 183, 184, 201, 260, 313-316.

Need Not Recognize Volunteer, 105-107.

Non-Existent, 280, 281.

Not Bound by Broker's Acts, 43, 44, 47.

Notice to Broker as Notice to, 270-273.

Not Owner of Property, 214-217, 360.

Purchaser as, 125, 126, 220, 221.

“ Relying upon Statements of, 310, 311.

Ratification of Broker's Unauthorized Acts by, 45, 51, 52, 65, 262-265.

“ “ Volunteer's Acts by, 107-113.

Refusal of, to Accept Loan, 203, 204.

Relations of Agent to, 255-259. (See also Relations.)

“ “ to Agent, 250-254.

Rights after Failure of Broker's Efforts, 102, 103, 135, 173, 174, 252-254.

“ “ Termination of Broker's Employment, 81, 82, 85, 102, 103, 252-254.

Sale Consummated by, 100-102, 137-140, 251-254.

Termination of Broker's Agency by, 80-86.

Terms of. (See Terms of Sale.)

Undisclosed, 47, 70, 151, 152, 269, 270, 286-289.

Purchase, of Property. (See Purchaser; also Sale.)

Authority of Broker to Purchase, 29-31.

Purchaser. (See also Principal.)

Abandonment by, 135, 182, 183.

“ of by Broker, 102, 103, 173, 174.

as Principal, 125, 126, 158, 159, 220, 221.

Availability of, 155-165.

Broker also acting for, 48-57, 66, 67, 151, 187, 272, 273.

“ as, 65-67.

Commissions by, 125, 126, 183, 218-221.

Disclosure of, 159-161.

Employment of Broker by, 125, 126, 151, 152, 220, 221.

Failure of, to Complete Purchase, 120, 181-184. (See also Failure.)

Fraudulent Concealment of Facts by, 296-298.

Financial Ability of, 161-165.

Must Exercise Caution, 312-316.

Negligence of, 310-317. (See also Negligence.)

Not Ready, and Willing, 156-158.

“ Responsible for Commissions, 183.

Ready, Willing and Able, 115-122, 141, 142, 155-158.

Relying upon Statements of Vendor, 310, 311.

Taking Title in Another's Name, 129.

Undisclosed, 159-161.

Q

Qualified Acceptance of Vendor's Offer, 168.

R

Railroad Consents, 370.

Ratification of Broker's Acts, by Acceptance of Proceeds, 262-265, 267.

by Implication, 111, 112, 262, 263.

“ Promise or Payment of Commission, 51, 52.

Equivalent to Employment, 107, 109-113.

Intent to Must be Plain, 107, 110, 111.

Must be with Full Knowledge, 112, 113.

of Broker's Contract, 45, 319, 320.

“ “ Unauthorized Acts, 45, 109-113.

“ Double Employment, 51, 52.

“ Subagent's Acts, 71, 72.

“ Volunteer's Acts, 107-113.

Real Estate. (See Property.)

Boards, Rules of, 235, 236.

Broker. (See Broker.)

Sale of. (See Sale.)

Reasonable Time, Termination of Agency after, 81-86.

What Constitutes, 81-84, 147.

Recitals in Contract Not a Waiver of Fraud, 320, 321.

Recovery of Commissions, 70-74, 102-104, 107, 108, 115-117, 203, 204, 206.

207. (See also Pleading.)

by One Not a Broker, 231.

“ Subagent, 70-74.

Complaint for, 331-340. (See also Pleading.)

Forms, 440-442, 445.

Employment Necessary to, 107, 108.

on Leases, 206, 207.

“ Loans, 203, 204.

Requirements for, 102-104, 115-117, 206, 207.

Relations of Agent to Principal, 48-57, 59-66, 255-259.

Must Act in Interest of Principal, 48, 49, 59, 60, 64, 65, 256.

“ Disclose Relevant Information, 258.

“ Give Faithful Service, 256, 257.

“ Not Exceed Authority, 257, 258.

Responsibility to Principal, 255,

Relations of Principal to Agent, 250-254.

Relief, When Negligence of Vendee is No Bar to, 316, 317.

Remedies for Fraud, 321-326.

Renting Agency, 75-77.

Rents, Authority of Broker to Collect, 31, 75, 76.

Misrepresentations as to, 258, 307.

Repairs, 75.

Requirements as to Earned Commissions, 94-104, 117-125, 130-134, 166-174, 240-242. (See also Commissions.)

as to Good Faith of Broker, 54-56, 59-68, 150-154, 256-258, 272, 273.

“ “ Interpleader, 351, 352.

“ “ Price, 145-147.

“ “ Procuring Cause, 114-126. (See also Procuring Cause.)

“ “ Recovery of Commissions, 102-104, 115-117, 206, 207.

Rescission, 311.

in Case of Fraud, 318-326.

Action for, 322, 323.

Must be Prompt, 319, 320, 323.

Responsibility of Broker to Principal. (See Duty of Broker.)

Restrictions on Property, 368, 369.

Forms, 415, 416.

Revocation of Broker's Authority, 79-92. (See also Termination.)

Notice of, 92.

Rights of Principal, after Failure of Broker's Efforts, 102, 103, 135, 173, 174, 252-254.

after Termination of Broker's Agreement, 81, 82, 85, 102, 103, 252-254.

Rule as to Broker with Discretion, 54-56.

“ “ Caution Required of Vendee, 313-316.

“ “ Commissions, 93-104. (See also subheads.)

All in Excess of Fixed Price, 226-228.

on Exchanges, 187-192.

“ Loans, 194-200.

When Broker's Efforts Fail, 102, 103, 253, 254.

“ Customer Fails to Complete Sale, 181, 182.

“ Due, 238-240.

“ Lease Fails, 208-211.

“ Principal Fails to Complete Sale, 176, 177.

as to Completed Transaction, 167.

“ “ Double Employment, 54-56.

“ “ When Broker is Procuring Cause, 124, 125, 238-240.

Rules of Real Estate Boards, 235, 236.

Forms, 380-397.

S

Sale of Property, Agreements for. (See Agreements.)

Authority of Broker to Negotiate, 27-31.

Forms, 426-431.

Does Not Include Authority to Exchange, 187.

Broker as Procuring Cause of. (See also Procuring Cause.)

Consummated by Another Broker, 86, 135-137.

“ “ Principal, 100-102, 137-140, 251-254.

Contracts for. (See Contracts.)

Forms, 398-425.

Sale of Property—Continued.

Failure of. (See Failure.)

Must be on Employer's Terms, 141-149, 156-158, 167-169, 202, 203.

Nature of, 353, 354.

on Installment Payments, 248, 249.

Forms, 415-418.

Option Not a, 158, 171, 172.

Oral Understandings as to, 363, 364.

Previous, 86, 87.

Termination of Agency by, 79, 80.

“ “ “ “ Previous, 86, 87.

Terms of. (See Terms.)

Usual Methods of Closing, 354-356.

Salesman's Contract, Forms, 429-431.

San Francisco, Schedule of Fees, Charges and Commissions, Forms, 397.

Schedules of Fees, Charges and Commissions, Forms, 380-397.

Seal, Contracts Under, 40, 46, 47, 269, 270, 334.

Second Mortgages, 372, 373.

Secret Profits, 56-68, 151, 152, 272.

Combinations to Secure, 59, 67, 68.

Seller. (See Principal.)

Signature to Contracts, 46, 47, 360-362. (See also Signing.)

Signing Contracts of Sale, 36-47, 360-362.

Authority of Broker, 26, 27, 36-47, 360-362.

Broker's Incidental Power as to, 44, 45.

Corporation's Signature, 47, 361, 362.

Executor's Signature, 360, 361.

Powers as to Conferred by Appointment as Agent, 36-38, 43-46.

“ “ “ “ “ Instructions to Sell, 37, 115-117, 187.

Statutory Requirements as to, 38, 39.

Signs, Affixing, 289, 290.

Silence Not Usually a Fraud, 293-298.

**Special Commission Agreements, 115, 118, 121-124, 128, 146, 170, 178, 179,
218-220, 223-228, 241-248, 338, 339.**

as to Title, 178, 179.

Pleading, 338, 339.

Special Clauses in Contract of Sale, 366, 377, 378.

St. Louis, Application for Loan, Forms, 433-435.

Schedule of Fees, Charges and Commissions, 392, 393.

Statute of Frauds, 26, 31-35, 38, 39, 45, 356, 357.

Agreements Not to be Performed Within a Year, 33, 34.

as Affecting Contracts of Sale, 38, 39, 356, 357.

Streets, Ownership in, 366-368.

Subagents, 70-74.

Suburban Property, 373-375.

Maps of, 373-375.

Suit. (See Pleading; also Interpleader.)

Surrender of Contract, 46.

T

Tax on Right to Act as Broker, 24, 25.

Tenant, 75-77.

Dispossession of, 76, 77, 211.

Failure to Consummate Lease, 208-211.

Liability for Commissions, 207.

Termination of Broker's Authority, 24, 33, 76, 79-92.

as to Third Parties, 92.

at Pleasure of Principal, 33, 80-86.

General Rule, 83, 84.

by Bankruptcy, 87, 88.

" Broker, 33, 80, 84.

" Death, 76, 90, 91.

" Destruction of Property, 87.

" Fraud of Broker, 91.

" Insanity, 88-90.

" Mutual Consent, 79.

" Performance, 79, 80.

" Previous Sale, 86, 87.

" Principal after Reasonable Time, 81-86.

General Rule, 83, 84.

" Severance of Joint Interest, 87.

Good Faith Must be in, 81, 84-87.

Must be Timely, 86.

of Naked Authority, 80.

Principal's Rights after, 81, 82, 85, 102, 103, 252-254.

When for Definite Time, 84.

Termination of Renting Agency, 76.

Terms of Sale, 141-149. (See also subheads.)

Acceptance by Owner of Different, 95, 144, 145.

Broker Must Secure Best Offer Possible, 49, 152, 153.

Cannot be Changed after Acceptance by Purchaser, 142, 143.

Change of, 95, 142-147, 157, 168, 169, 171.

Principal's Terms Must be Met, 141-147, 156-158, 167-169, 202, 203.

When Not Specified, 52-56, 66, 67, 142, 148, 156, 167.

Third Parties, Authority of Broker as to after Revocation, 92.

Broker's Contract with after Death of Principal, 91.

Liability of Broker to, 275-290.

" " Principal to, 266-274.

Time for Delivery of Deed, 375, 376.

of Performance, 31-35, 80-84, 147, 148.

Title, Agreement to Wait for Closing of, 245-247.

Approval Clause in Contract of Sale, 377, 378.

Closing of, 376.

Title—Continued.

- Defective, 177-179, 182, 184, 188-192, 194-201, 244, 246-248.
- Misrepresentations as to, 309.
- Opinions as to Marketability of, 179.
- Purchaser Taking in Another's Name, 129.
- Special Agreements as to, 178, 179.
- Vendor's Warranty of, 247, 248.
- Transaction Must be Complete**, 166-174.
- Trespassing by Broker**, 289, 290.
- Trustees, Liability for Commissions**, 217, 218.
 - Power to Make Contract of Sale, 360, 361.
 - Signature to Contract of Sale, 360, 361.

U

- Unauthorized Acts of Broker**, 37, 106-113, 267, 268, 282-286.
 - Acts of Volunteer, 106-108.
 - Contracts,
 - Ratification of, 45.
 - Liability of Agent for, 281-286.
- Undisclosed Principal**, 47, 70, 151, 152, 269, 270, 286-289.
 - Purchaser, 159-161.
- Unsuccessful Efforts.** (See Failure.)
- Unsupported Agreements Deferring Commissions**, 241-243.
- Usage.** (See Custom.)
- Usury of Broker**, 274.

V

- Valid Agreements Deferring Commissions**, 243.
- Value, Assertions and Opinions as to**, 300-304.
 - Misrepresentations as to, 306.
- Vendee.** (See Purchaser.)
 - Meaning of Term, 21.
- Vendor.** (See Principal.)
 - Meaning of Term, 21.
- Volunteers**, 105-113, 231, 232.
 - Ratification of Acts by Principal, 107-113.

W

- Waiver of Commissions**, 168, 224.
 - of Fraud, 318-321.
 - Not Effected by Recitals in Contract, 320, 321.
 - What Constitutes, 319, 320.
 - of Right to Disclosure of Purchaser, 160, 161.
- Walls, Party**, 365.
- Washington, Authority of Broker to Purchase and Sell Property**, 31.
- Who May Act as Broker**, 22-25.
- Written Authority of Broker**, 26-34, 38-42, 44, 46, 71, 201, 202.
 - Forms, 426-431.

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THE LAW OF
REAL ESTATE BROKERS

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FRED L. GROSS
Of the New York Bar



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PREFACE TO SUPPLEMENT

Probably no book was ever written in which, upon completion, an honest author could not see opportunities for improvement. And, in the law, where new principles are being evolved and old principles are being wrested to fit new situations, the period which has elapsed since the publication of "The Law of Real Estate Brokers" will well justify the presentation of additional authorities and material.

No endeavor will be made to summarize the additions which these supplemental pages supply. A cursory investigation will satisfy the reader that all of the added material relates to substantial and essential principles and problems of the subject matter of the volume.

In some of the sections of this supplement cross-references have been made to other sections. Wherever this occurs, the section referred to should be consulted both in the supplemental pages and in the original volume. Such references are frequently intended to call the reader's attention to the original text where a related or antithetical feature is discussed.

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189 Montague Street,
Brooklyn, New York,
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CONTENTS

Part I—Powers, Authority and Rights of Broker

Chapter	Page
I	INTRODUCTORY 11
	§ 2. Application of Term
II	WHO MAY ACT AS BROKER. LICENSE RE- QUIREMENTS 11
	§ 10a. Public Officials
	10b. Attorney Acting as Broker
	11. License or Tax on Right to Act as Broker
	11a. License of Insurance Brokers
III	WRITTEN AND ORAL AUTHORITY OF BROKER 17
	§ 13. Form of Authorization
	13a. Written Authorization Required by Statute
	16. New Jersey; Authority to Sell or Exchange
	17. California; Authority to Purchase or Sell
	18. Missouri; Authority to Sell
	21. Washington; Authority to Sell or Purchase
	22a. Oregon; Authority to Sell or Purchase
	22b. Arizona; Authority to Sell or Purchase
	22c. Indiana; Authority to Sell
IV	BROKER'S POWER TO SIGN CONTRACT . . . 20
	§ 28. Broker's Authority to Sign Contract
	29. Powers Conferred by Instructions to Sell Property
	30. Powers Conferred by Appointment as Agent
	37. Rule in Other States
	38. When Broker has Authority to Sign Con- tract
	41. Dissenting Opinions as to Incidental Power to Contract
V	BROKER ACTING FOR BOTH PARTIES . . . 22
	§ 49. Acting for Both Parties a Breach of Con- tract
	51. The Rule Applies to Exchange of Property
	52. Acting for Both Parties with Their Knowledge
	54. Broker Vested with No Discretion May Act for Both Parties
	55. Compensation of Broker Without Dis- cretion
	58. How Question of Double Employment Is Raised

Chapter		Page
VI	BROKER'S RIGHT TO INTEREST IN PROFITS .	25
	§ 62. Agent May Not Also Act as Principal	
	63. Agent May Not Make Secret Profits	
	66. Act of Agent in His Own Interest Presumed Injurious	
	67. Act of Agent in His Own Interest Voidable, but May Be Ratified	
	68. Agent May be Personally Interested with Consent of Principal	
	69a. When Minimum Price Is Fixed	
	70. Broker May Not Lawfully Combine with Others to Secure Secret Profits	
VII	GENERAL AUTHORITY OF BROKER . . .	28
	§ 74. Broker's Power to Employ Other Brokers	
	75a. Liability of Renting Agent for Violation of Labor Law	
	78. Insurance Brokers	
	78a. Compensation for Appraisals and Giving Expert Testimony	
VIII	REVOCATION OF BROKER'S AUTHORITY .	33
	§ 80. Termination of Agency by Mutual Consent	
	82. Termination of Agency at Pleasure of Principal	
	83. Termination by Principal After Lapse of Reasonable Time	
	85. Revocation of Agency by Principal Must Be in Good Faith	
	87. Termination of Agency by Previous Sale	
	Part II—Commissions and Their Recovery	
IX	GENERAL RULES AS TO COMMISSIONS . . .	35
	§ 97. Respective Rights of Brokers when Several are Employed	
	98. Rule as to Commissions when Several Brokers are Employed	
	100. Liability for Commissions when Principal Negotiates Sale	
X	BROKER MUST BE EMPLOYED	37
	§104. Volunteers Not Entitled to Commission	
	107. Manner of Employment	
	111. Ratification by Implication	
XI	BROKER MUST BE PROCURING CAUSE OF SALE .	38
	§116. Procuring Cause	
	117. What is Required to Constitute a Broker a "Procuring Cause"	
	119. General Rule as to "Procuring Cause"	
	121. Effect of Promises to Pay Commission	
	122. Unsuccessful Efforts	

Chapter		Page
	125. Effort Required of Broker	
	126. Presence of Broker	
	127a. Notifying Principal That Customer is Broker's Client	
	128. Advertising	
	130. Consummation of Sale by Principal	
XII	SALE MUST BE ON EMPLOYER'S TERMS . . .	44
	§132. Purchaser Must Agree to Seller's Terms	
	133. All of Seller's Terms Must be Met	
	134. Acceptance by Owner of Different Terms	
	135. Broker's Commission, if He is "Procuring Cause," Not Affected by Variation of Terms	
	136. Requirements as to Price	
	139. Liability of Broker for Failure to Sell	
XIII	BROKER MUST ACT IN GOOD FAITH . . .	48
	§141. Good Faith	
	142. Accepting Pay from or Acting for Other Party to the Transaction	
	145. When Refusal to Disclose Information is Not Bad Faith	
XIV	AVAILABILITY OF PURCHASER	52
	§147. Ready and Willing to Purchase	
	148. Purchaser Not Ready and Willing	
	149. Procuring Person Who Takes Option	
	150. Change of Mind by Vendor	
	151. Disclosure of Purchaser	
	153. Financial Ability of Purchaser	
	154. When Financial Ability of Purchaser Need Not be Shown	
	155. Burden of Proof as to Financial Ability of Purchaser	
XV	TRANSACTION MUST BE COMPLETE	57
	§157. What Constitutes a Completed Transac- tion	
	158. General Rule as to Completeness of Trans- action	
	163. Options and "Alternative" Contracts	
XVI	FAILURE OF PRINCIPAL TO COMPLETE	58
	§167. General Rule as to Failure of Principal to Complete	
	168. Defective Title as Cause of Failure	
	170. Special Causes of Failure	
XVII	FAILURE OF CUSTOMER TO COMPLETE	60
	§172. General Rule as to Failure of Customer	
	173. Abandonment of Broker by Customer	
	174. Misrepresentations by Vendor	

Chapter		Page
XVIII	COMMISSIONS ON EXCHANGES OF PROPERTY	62
	§177. Commissions on Exchanges	
	179. Authority to Sell Does Not Give Authority to Exchange	
	181. Rule When Contract Has Been Executed	
	182. Reason for Rule	
	183. Rule as Affected by Broker's Bad Faith	
XIX	COMMISSIONS ON LOANS	64
	§186. New York Rule	
	188. The Rule in Some of the Other States	
	191. Failure to Complete on Account of Defects, etc.	
	195. Amount of Commissions on Loan	
XX	COMMISSIONS ON LEASES	68
	§197. When Broker's Obligations Are Performed	
	198. General Requirements for Recovery of Commissions	
	198a. Commissions on Renewal of Lease	
	202a. Commission on Sale of Leasehold	
XXI	WHO IS LIABLE FOR COMMISSIONS	71
	§204. The Employer Is Usually Liable for Broker's Commissions	
	205. Promises to Pay Commissions	
	206. Liability of Persons Not Owning the Property	
	207. Trustees, Executors, and Guardians	
	207a. Corporations	
	208. Commissions from Purchaser	
	209. Purchaser's Promise to Pay Commission	
	210a. Purchaser's Liability for Commissions on Refusal to Purchase	
	210b. Misrepresentation by Purchaser to Seller as to Who is Broker	
XXII	AMOUNT OF COMPENSATION	80
	§214. Measure of Compensation	
	214a. Promise to Pay Increased Commissions	
	216. Agreements for All in Excess of Fixed Price	
	217. Rule as to All in Excess of Fixed Price	
	224. Proof of Custom	
	226. Compensation in the Absence of Agreement or Usage	
XXIII	WHEN COMMISSIONS ARE DUE	83
	§228. Rule as to When Commissions are Due	
	230. Unsupported Agreements to Wait for Commission	
	231. Valid Agreements Deferring Payment of Commissions	

Chapter		Page
	232. Contingent Commission Agreements	
	233. Construction of Agreements to Wait until Title is Closed	
	235. Commissions on Instalment Sales	
XXIIIa	SUNDAY SALES	87
	§235a. General Statement	
	235b. Sunday Contracts Not Prohibited by Common Law	
	235c. Liberal or Strict Construction of Sunday Laws	
	235d. Commissions on Sunday Sales	
	235e. Sunday Laws of Various States	
	235f. Effect of Sunday Laws on Executory and on Executed Contracts	
	235g. Sunday Statutes Which Do Not Affect Sunday Contracts	
	Part III—Principal and Agent	
XXIV	PRINCIPAL'S RELATIONS TO AGENT	93
	§237. Principal May Employ Several Brokers	
	239. Exclusive Agency	
	240. Intervention by Principal	
	242. Rule when Broker's Efforts Fail	
XXV	AGENT'S RELATIONS TO PRINCIPAL	95
	§249. Agent's Power to Make and Indorse Negotiable Paper	
XXVI	LIABILITY OF BROKER AND PRINCIPAL	96
	§252. Misrepresentations by Brokers and Agents	
	257. Fraud of Agent; Pleading	
XXVII	LIABILITY OF PRINCIPAL TO THIRD PARTIES	97
	§260. Liability of Principal for Agent's Wrongdoing	
	264. Notice to Agent as Notice to Principal	
XXVIII	LIABILITY OF BROKER TO THIRD PARTIES	99
	§271a. Personal Liability of Agent on Contracts	
	273. Liability of the Agent on Unauthorized Contract	

Part IV—Fraud

XXIX	WHAT CONSTITUTES FRAUD. ACTS NOT USUALLY CONSIDERED FRAUDULENT	100
	§285. Promises, Hopes, etc.	
	286. Promises and False Representations	
	287. Opinions; Expressions of Value	
	289. Opinions Amounting to Affirmations of Fact	
	291. When Expression of Opinion Fraudulent	

Chapter	Page
XXX WHAT CONSTITUTES FRAUD. ACTS USUALLY CONSIDERED FRAUDULENT	104
§293. Representation That Certain Price Had Been Offered	
294. Representation as to Value and Price Paid for Property	
295. Representations as to Rentals	
297. Representations as to Situation of Property	
300. Representations as to Title of Vendor	
XXXI NEGLIGENCE ON PART OF VENDEE	105
§307. Negligence No Bar to Relief in Cases of Wilful Fraud	
XXXII WAIVER. RESCISSION. REMEDIES	106
§309. Waiver of the Fraud	
310. What Constitutes Waiver of Fraud	
317. Offer to Restore	
319. Pleading Fraud Committed by More Than One	
Part V—Procedure	
XXXIV PLEADING	108
§331. Pleading the Facts Constituting the Cause of Action	
333. Facts to be Stated	
334. Full Performance and Excuse for Per- formance	
335. Pleading Special Agreements	
336a. Bill of Particulars	
336b. Preference of Broker's Action on Trial Calendar	
337. Pleading Acts Done by Agent	
XXXV INTERPLEADER	112
§345. Requisites of Interpleader	
Part VII—Schedules and Forms	
XXXIX FORMS OF CONTRACTS FOR SALE OF REAL ESTATE	114
Form 17. Contract of Sale. New York City	
XL MISCELLANEOUS FORMS	114
Form 36a. Exclusive Agency Agreement	
40a. Acceptance of Mortgage Application; General New York Title Companies' Form; Personal Liability of Appli- cant	
43a. Agreement for Compensation for Loan	

The Law of Real Estate Brokers

1917 Supplement

Part I—Powers, Authority and Rights of Broker

CHAPTER I

INTRODUCTORY

§ 2. Application of Term (p. 19)*

Add to footnote 3:

Geddes v. Van Rhee, 126 Minn. 517; 148 N. W. 549 (1914).

CHAPTER II

WHO MAY ACT AS BROKER. LICENSE REQUIREMENTS

§ 10a. Public Officials (p. 24)

A deputy tax commissioner holds a quasi-judicial office and it is against public policy to enforce an alleged contract to pay him commissions as a broker for procuring a purchaser for lands, where the contract was the result of the plaintiff's activities *ex colore officii*.¹

*Page numbers following section headings refer to the body of the original book.

¹Moorehead v. Realty Associates, 166 App. Div. 782; 152 N. Y. Suppl. 342 (1915); *affd.*, 220 N. Y.—(1917), no opinion.

§ 10b. Attorney Acting as Broker (p. 24)

An attorney employed solely to procure a loan for a client acts merely as agent and communications between them in regard to the loan are not privileged. This is so, although the attorney had represented the client professionally in other transactions.²

Where an attorney at law procures a mortgage loan, he does not act in his capacity as an attorney at law, but like any other agent, and therefore the necessity of alleging and proving that he is a regularly licensed attorney at law does not exist.

§ 11. License or Tax on Right to Act as Broker (p. 24)

Power and authority exist in the legislature to license and regulate certain vocations, but such power and authority are dependent upon a reasonable necessity for their exercise to protect the health, morals, or general welfare of the state.³

It would be impracticable to present the various statutory or local enactments upon the subject of licenses to do business as a real estate broker. In order, however, to convey a general idea as to how these requirements are ordinarily regulated by local ordinances, Chapter 15 of the Chicago Code of City Ordinances (1911) relating to licenses of real estate brokers is given below:

BROKERS

192. *License—Application—Fee.* It shall be unlawful for any person or corporation to engage in the business or act in the capacity of a broker within the city, without first obtaining a license therefor. Application for such license shall be made in writing to the Mayor, and upon payment to the City Collector of the sum of \$25, a license shall be issued to the applicant by the City Clerk. Such application shall state the name of the person or corporation and the location of the place or places of business for which such license is desired.

193. *Change of Location.* If, after the issuance and delivery of a license under the provisions of this chapter, any change shall be made in the place or places of business covered thereby, no business shall be carried on in such new

²Lifschitz v. O'Brien, 143 App. Div. 180; 127 N. Y. Suppl. 1091; 2 Civ. Pro. Rep. (N. S.) 236 (1911).

³People v. Ringe, 197 N. Y. 143; 90 N. E. 451 (1910).

location until a notice shall have been given, in writing, to the City Collector.

194. *Broker Defined.* A broker is one who is engaged for others in negotiating contracts relative to property with the custody of which he has no concern.

195. *Real Estate Broker Defined.* A real estate broker is one who is engaged for others in negotiating contracts relative to real estate.

196. *Insurance Broker Defined.* An insurance broker shall include any and every person or corporation engaged, for others, in negotiating contracts for insurance on lives, buildings, vessels or other property, either directly or through any other broker or through any insurance agent, or with any insurance company other than an insurance company of which such person shall be an employee.

197. *Employees Acting as Brokers.* Any person employed by a person or corporation licensed as a broker under the provisions of this chapter, who shall himself engage in the business or act in the capacity of a broker, shall, notwithstanding the fact of such employment be amenable to all the provisions of this chapter and shall be required to take out a broker's license.

198. *Penalty.* Any person or corporation violating any of the provisions of this chapter shall be fined not less than twenty-five dollars nor more than two hundred dollars for each offense.

It has been said that, "it is the law that if a statute or ordinance declares it to be unlawful for a person to act as a broker without a license and prescribes a penalty for its violation, an unlicensed broker cannot recover upon the contract for commissions, even though the statute or ordinance does not, in terms, declare the contract void."⁴

Yet the same court has held that where an action is brought on a promise to pay for services rendered for negotiating a real estate transaction, the fact that plaintiff is not a licensed broker is no defense.⁵

And so, it has been said that, "under a Statute passed for the purpose of raising revenue, which provides that every person or firm engaged in the business of buying or selling real estate on commission shall pay the sum of \$10 for each county in which he or they may

⁴Friedland v. Isenstein, 191 Ill. App. 109 (1915); Fuerst v. Stone, 192 Ill. App. 256 (1915).

⁵Gibbons v. Williams, 191 Ill. App. 594 (1915).

conduct such business, and that, before such persons shall be authorized to open up or carry on such business, they shall go before the ordinary of the county in which they propose to do business and register their names and the business they propose to engage in, the place where it is to be conducted, and shall then pay their tax to the collector, and that any person failing to comply with the foregoing requirements shall be guilty of a misdemeanor, but which does not provide that the business conducted by such person failing to comply with the statute shall be void and unenforceable, it is not a defense to a suit brought by such person selling or buying real estate on commission, to recover commissions on sales of real estate made by him, that he had failed to pay the tax and register as required by statute."⁶

An act in violation of a statute or municipal ordinance forbidding it, may, as a general rule, be said to be void, but when the statute or ordinance is for the purpose of raising revenue, and does not make the act itself void, and the act is not *malum in se* nor detrimental to good morals, many courts have made exceptions and will not hold such act absolutely void. This rule is generally applied to statutes and ordinances regulating or licensing the business of real estate brokers.⁷

Where such statute or ordinance does not provide that a failure to pay the tax, or to procure the license, or to register, renders any agreement of the broker void, the penalty for a violation of the statute or ordinance may be said to be against the person of the agent, and not against his act. The law may provide for punishment as a misdemeanor, but that would not render the broker's agreement unenforceable unless the statute or ordinance expressly, or by necessary implication, makes them unenforceable.⁸

The legality of a broker's agreement is not affected by his failure to comply with a requirement in which, as a revenue measure, only the state is concerned.⁹

An ordinance making it unlawful for one to engage in the business, or act in the capacity, of a broker, within the city, without first obtaining a license, applies only to persons engaged in the business of

⁶Syllabus by the court in *Toole v. Wiregrass Dev. Co.*, 142 Ga.—; 82 S. E. 514 (1914).

⁷See *Hughes v. Suell*, 28 Okl. 328; 115 Pac. 1105; 34 L. R. A. (N. S.) 1133; Ann. Cas. 1912 D, 374; *Vermont Loan Co. v. Hoffman*, 5 Idaho 376; 49 Pac. 314; 37 L. R. A. 509; 95 Am. St. Rep. 186; *Coates v. Locust Point Co.*, 102 Md. 291; 62 Atl. 625; 5 Ann. Cas. 895; *Watkins Land Mortgage Co. v. Thetford*, 43 Tex. Civ. 536; 96 S. W. 72.

⁸*Toole v. Wiregrass Dev. Co.*, *supra*.

⁹*Swift v. Mocre*, (Ga. App.) 82 S. E. 914 (1914).

brokerage as an occupation or vocation and not to a person negotiating a single sale.¹⁰

Legislation requiring a license does not prevent a person whose business and occupation was not that of a real estate broker from receiving compensation for services rendered in buying and selling real estate belonging to another.¹¹

A city ordinance requiring a license to be taken out by an employee of a broker where he shall himself engage in the business, or act in the capacity of a broker, is held not to apply to mere employees of brokers, though they are paid for their work a certain portion or per cent of the commissions.¹²

Where a broker's license is issued to a partnership, and one of the partners succeeds to the business of the partnership upon dissolution of the firm and continues business individually at the same location, he is to be considered a licensed broker.¹³

Where a contract for the payment of a commission for the exchange of real estate is made in another state (Michigan), a city ordinance making it unlawful for a person to act in the capacity of a broker in a city within the state (Illinois) has no application, such as to render the contract invalid.¹⁴

§ 11a. License of Insurance Brokers (p. 25)

In some states, persons acting as insurance brokers are required to be licensed.¹⁵ In New York, § 91 of the Insurance Law provides that no life insurance company doing business in the state shall pay to any person any commission for services in obtaining new insurance unless such person has procured a certificate of authority to act as agent of such company as in the section provided, and that no person shall act as agent or receive any commission for services in obtaining new insurance for such life insurance company without procuring such a certificate. The section further provides that such certificate shall be issued by the Superintendent of Insurance of the State only upon the written application of persons desiring such authority, upon a form approved by the Superintendent, giving such information as he may require, and that he shall have the right to refuse to issue or renew any such certificate, in his discretion.¹⁶ The section was held unconstitutional by the lower court, on the ground that it vested

¹⁰Ross v. New South Farm & Home Co., 191 Ill. App. 353 (1915).

¹¹Roeder v. Butler, 19 Pa. Super. Co., 604 (1902), in which the plaintiff was a lawyer. Cf. § 195.

¹²Thorpe v. Weber, 191 Ill. App. 2 (1914). See Chicago City Ordinances, *supra*.

¹³Friedland v. Isenstein, *supra*.

¹⁴Egeland v. Scheffler, 189 Ill. App. 426 (1914).

¹⁵See § 78.

¹⁶N. Y. Consol. Laws, Ch. 28, § 91, as amended by L. 1909, Ch. 301.

in the Superintendent an unrestricted discretion to grant or withhold a license at his pleasure, unregulated by any common standards of qualifications or conditions, and thus vested arbitrary powers in him to prevent any person from pursuing a lawful calling.¹⁷ This determination was reversed,¹⁸ the court saying: "The right of every person to pursue any lawful business or calling is, of course, subject to the paramount right of the State to impose such restrictions and regulations as the protection of the public may require.¹⁹ This power must be exercised, however, in conformity with the constitutional requirement that the restriction imposed must operate equally upon all persons pursuing or seeking to pursue such calling or occupation, under the same circumstances It is well settled that if a statute is susceptible of two constructions, by one of which it would be unconstitutional and by the other valid, the latter construction should be adopted rather than the former."

In another New York case²⁰ it was held that the Legislature has the right to regulate the business of soliciting fire insurance and to require that those seeking to engage therein shall first secure a license from the state authorities, although it was held in that case that the statute then under consideration was void in that it undertook to limit the right to engage in the business of fire insurance agent or broker to such persons as intended to carry on such business as their principal occupation or in connection with a real estate business.²¹

¹⁷*Stern v. Metropolitan Life Ins. Co.*, 90 Misc. 129; 154 N. Y. Suppl. 283 (1915).

¹⁸ 169 App. Div. 217; 154 N. Y. Suppl. 472 (1915).

¹⁹ Citing *People ex rel. Armstrong v. Warden, etc.*, 183 N. Y., 223; 76 N. E. 11; 2 L. R. A. (N. S.) 859; 5 Ann. Cas. 325.

²⁰ *Hauser v. North British & M. Ins. Co.*, 152 App. Div. 91; 136 N. Y. Suppl. 1015 (1912); *affd.*, 206 N. Y. 455; 100 N. E. 52; L. R. A. (N. S.) 1139; Ann. Cas. 1914 B, 263 (1912).

²¹ *Cf. Welch v. Maryland Casualty Co.*, 147 Pac. 1046; L. R. A. 1915 E. 708.

CHAPTER III

WRITTEN AND ORAL AUTHORITY OF BROKER

§ 13. Form of Authorization (p. 26)

Add to footnote 1:

Hancock v. Dodge, 85 Miss. 228 (1904). See Miss. Code of 1892, §4225, par. (C).

A verbal modification of written authority to sell real estate does not render the altered authority obnoxious to the Statute of Frauds.¹ There is, however, authority that where a broker is given written authority in compliance with the statute, it cannot be subsequently orally modified so as to authorize the broker to sell for a less price than stated in the written authorization.²

§ 13a. Written Authorization Required by Statute (p. 27)

"Under a section of a statute of frauds declaring that 'no broker or real estate agent selling or exchanging land for or on account of the owner shall be entitled to any commission for the same, or exchange any real estate unless the authority for selling or exchanging such land is in writing, signed by the owner or his authorized agent, and the rate of commission on the dollar shall have been stated, in such authority,' it was determined that, in the absence of a previous written contract, a subsequent written promise to pay the commission was without consideration and void.³ A different conclusion was reached in the case of Muir v. Kane,⁴ where, in construing a statute providing that any agreement authorizing a broker to sell or purchase real property for a commission should be void unless the contract or some note or memorandum thereof was in writing, it was decided that the performance of the services under an oral agreement, void under the statute of frauds, raised a moral obligation which was a sufficient consideration to support a subsequent written promise to pay the stipulated compensation. When an enactment expressly declares that an agreement for the payment of a commis-

¹Furse v. Lambert, 85 Neb. 739; 124 N. W. 146 (1910).

²Wellenger v. Crawford, (Ind. App.) 89 N. E. 892 (1909).

³Sorensen v. Smith, 65 Or. 78; 129 Pac. 757; 131 Pac. 1022; 51 L. R. A. (N. S.) 612; 35 Ann. Cas. 1127 (1913); citing Stout v. Humphrey, 69 N. J. L. 436; 55 Atl. 281; Leimbach v. Regner, 70 N. J. L. 603; 57 Atl. 138; Bagnole v. Madden, 76 N. J. L. 255; 69 Atl. 967.

⁴55 Wash. 131; 104 Pac. 153; 19 Ann. Cas. 1180; 26 L. R. A. (N. S.) 519.

sion for securing a purchaser of land is void, unless it is in writing and signed by the owner of the real property, the rule is well established that, in the absence of a written contract, a full performance of the services by the broker does not take the case out of the statute of frauds."⁵

§ 16. New Jersey; Authority to Sell or Exchange (p. 29)

Add to footnote 14:

Heyman v. Stopper, 91 Atl. (N. J.) 1069 (1914); affg. 85 N. J. L. 128; 88 Atl. 946.

§ 17. California; Authority to Purchase or Sell (p. 29)

✓ Although a contract employing a broker is required to be in writing, that would not apply to an agreement by a principal broker to pay an assistant a specified commission for services.⁶

§ 18. Missouri; Authority to Sell (p. 29)

The Missouri Act of March 28, 1903 (§ 4634, R.S. 1909), forbidding an agent in certain cities to sell real estate unless his authority is in writing, is unconstitutional.⁷

§ 21. Washington; Authority to Sell or Purchase (p. 31)

Add to footnote 20:

J. E. Houtchens Co. v. Nichols, 142 Pac. (Wash.) 674 (1914); Baylor v. Tolliver, 142 Pac. (Wash.) 678 (1914); Salin v. Roy, 142 Pac. (Wash.) 679 (1914); Keith v. Smith, 46 Wash. 131; 89 Pac. 473; 13 Ann. Cas. 975.

§ 22a. Oregon; Authority to Sell or Purchase (p. 31)

In Oregon, an agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission is void "unless the same, or some note or memorandum thereof, expressing the consideration, be in writing"⁸

⁵Sorenson v. Smith, 65 Or. 78, 91; 129 Pac. 757; 131 Pac. 1022; 51 L. R. A. (N. S.) 612; 35 Ann. Cas. 1127 (1913); citing Myers v. Surryhne, 67 Cal. 657; 8 Pac. 523; Shanklin v. Hall, 100 Cal. 26; 34 Pac. 636; McGeary v. Satchwell, 129 Cal. 389; 62 Pac. 58; Dolan v. O'Toole, 129 Cal. 488; 62 Pac. 92; Beahler v. Clark, 32 Ind. App. 222; 68 N. E. 613; Price v. Walker, 43 Ind. App. 519; 88 N. E. 78; King v. Benson, 22 Mont. 256; 56 Pac. 280; Marshall v. Trerise, 33 Mont. 28; 81 Pac. 400; Blair v. Austin, 71 Neb. 401; 98 N. W. 1040; Rodenbrook v. Gress, 74 Neb. 409; 104 N. W. 758; Barney v. Lasbury, 76 Neb. 701; 107 N. W. 989; Gerard-Fillio Co. v. McNair, 68 Wash. 321; 123 Pac. 462.

⁶Hagemen v. O'Brien, 24 Cal. App. 270; 141 Pac. 33 (1914).

⁷Printz v. Miller, 233 Mo. 47; 135 S. W. 19 (1911); Woolley v. Mears, 226 Mo. 41; 125 S. W. 1112; 136 Am. St. Rep. 637 (1910); Cornet v. Cabrillic, 228 Mo. 212; 126 S. W. 1030 (1910); Klene v. Marjorie Realty Co., 228 Mo. 607; 128 S. W. 980 (1910). See also Young v. Ruhwedel, 119 Mo. App. 240 (1906).

⁸§808, L. O. L.

Under that statute it is held that the written authorization must state the compensation to be paid to the broker.⁹

§ 22b. Arizona; Authority to Sell or Purchase (p. 31)

"An agreement authorizing or employing an agent or broker to purchase or sell real estate, mines or other property, for compensation or a commission," cannot be sued upon unless in writing.¹⁰

Even full performance by the broker of his part of the contract does not take it out of the operation of the statute if the agreement is oral only.¹¹

§ 22c. Indiana; Authority to Sell (p. 31)

In Indiana the statute provides: "That no contract for the payment of any sum of money, or thing of value, as and for a commission or reward for the finding or procuring, by one person, of a purchaser for the real estate of another, shall be valid, unless the same shall be in writing signed by the owner of such real estate or his legally appointed and duly qualified representative."¹²

Accordingly it is held that there can be no recovery on an oral contract of employment to act as agent for the sale of real estate.¹³

But where the services have been rendered under an oral agreement, a subsequent written agreement executed after the services are rendered is enforceable.¹⁴

"Section 1 of the act of March 5, 1901 (Acts of 1901, p. 144, c. 67), and sec. 7463 of Burns' Revised Statutes of 1908, provide that no contract for the payment of money as a commission for finding or procuring a purchaser for real estate shall be valid unless the same is in writing and signed by the owner of the real estate. This act is supplemental to the statute of frauds and should be construed accordingly."¹⁵

⁹Taggart v. Hunter, 152 Pac. (Or.) 871 (1915).

¹⁰Civ. Code, Ariz. 3272, 1913.

¹¹McMurrin v. Duncan, 155 Pac. (Ariz.) 306 (1916). See also Keith v. Smith, *supra*.

¹²§6629a Burns 1901, Acts 1901, p. 104.

¹³Waddle v. Smith, 58 Ind. App. 587; 108 N. E. 537 (1914); Lowe v. Mohler, (Ind. App.) 105 N. E. 934 (1914); Zimmerman v. Zehender, 146 Ind. 466; 73 N. E. 920 (1905).

¹⁴Waddle v. Smith, *supra*.

¹⁵Wellenger v. Crawford, (Ind. App.) 89 N. E. 892 (1909).

CHAPTER IV

BROKER'S POWER TO SIGN CONTRACT

§ 28. Broker's Authority to Sign Contract (p. 36)

A distinction is drawn, too, between authority to sell and authority to convey land. "Authority to convey land must be conferred by an instrument of equal dignity with the instrument of conveyance; but authority to sell and to make a binding contract of sale may be conferred verbally."¹

✓ The powers of a general agent extend to the doing of all acts connected with the business of his principal and his authority will be deemed to include all usual means for the effective performance of his duties.

If the limitations upon the agent's authority to act are known to the person with whom he is dealing, or if the transaction is such as to charge him with the duty of inquiring into the extent of the agent's authority to do the particular act, the principal will be protected if the act be unauthorized, or in clear excess of the agent's powers, and if the principal be an innocent actor in the transaction.²

If a person dealing with an agent knows that he is acting under a circumscribed and limited authority, and that his act is outside of and transcends the authority conferred, the principal is not bound, and it is immaterial whether the agent is a general or a special one, because a principal may limit the authority of the one as well as that of the other.³

§ 29. Powers Conferred by Instructions to Sell Property (p. 37)

Add to footnote 3:

Fleming v. Hattan, 92 Kan. 948; 142 Pac. 971 (1914).

§ 30. Powers Conferred by Appointment as Agent (p. 38)

✓ ✓ "It is perfectly well settled and generally understood that the entire duty of a broker employed to sell or to assist in selling property

¹Davis v. Spann, 122 S. W. 495; 92 Ark. 213 (1909); citing Forrester-Duncan Land Co. v. Evatt, 119 S. W. 282; McCurry v. Hawkins, 83 Ark. 202; 103 S. W. 600.

²Cullinan v. Bowker 180 N. Y. 93; 72 N. E. 911 (1904), by a divided court.

³Quinlan v. Providence Washington Ins. Co., 133 N. Y. 356; 31 N. E. 31; 28 Am. St. Rep. 645 (1892).

is to search out a purchaser and to act as the intermediary to bring the seller and the purchaser together. In the absence of a special and well-defined authority it is no part of a broker's duty to actually make the sale in behalf of the owner." It is immaterial that the broker may have represented to the purchaser that he had authority to contract in behalf of the seller, for one cannot make himself an agent of another by merely asserting his agency.⁴

"It has been so often held that it must be regarded as settled in this state that authority to a broker to procure a purchaser is not authority to enter into an enforceable contract of sale."⁵

It has been held that "an agency to sell land carries with it no implied authority to bind the owner to furnish an abstract of title."⁶

In *Watkins v. Thomas*,⁷ the court inquires whether it is possible that a broker's authority to sell contemplates that he will find anyone who would be willing to buy without first learning that the vendor had title, "and how could one know that he had such title unless he had an abstract to so show? The court takes judicial notice of the custom in such cases that the authority to sell carries with it the obligation to furnish such abstract."

Add footnote 9a at end of § 30 (p. 38):

Record v. Littlefield, 218 Mass. 483; 106 N. E. 142 (1914).

§ 37. Rule in Other States (p. 42)

In Missouri, agent's authority to contract must be in writing.⁸

§ 38. When Broker Has Authority to Sign Contract (p. 42)

Add to footnote 23:

Keim v. O'Reilly, 54 N. J. Eq. 418; 34 Atl. 1073; *Brandrop v. Britten*, 11 N. D. 376; 92 N. W. 453; *Rhode v. Gallat*, 70 So. (Fla.) 471 (1915).

§ 41. Dissenting Opinions as to Incidental Power to Contract (p. 44)

It is held that where a broker is instructed "to go ahead and close the deal," he can sign the contract of sale for his principal.⁹

⁴*Stone v. U. S. Title Guaranty & Indemnity Co.*, 159 App. Div. 679; 144 N. Y. Suppl. 849 (1913).

⁵*Lawson v. King*, 56 Wash. 15; 104 Pac. 1118 (1909); citing *Cartens v. McReavy*, 1 Wash. 359; 25 Pac. 471; *Armstrong v. Oaklev*, 23 Wash. 122; 62 Pac. 499; *Foss Inv. Co. v. Ater*, 49 Wash. 446; 95 Pac. 1017; *Hardinger v. Columbia*, 50 Wash. 405; 97 Pac. 445; *Hutchins v. Wertheimer*, 51 Wash. 539; 99 Pac. 577.

⁶*Anderson v. Howard*, 155 N. W. (Iowa) 261 (1915).

⁷141 Mo. App. 263; 124 S. W. 1063 (1909).

⁸*Young v. Ruhwedel*, 119 Mo. App. 239 (1906).

⁹*Furse v. Lambert*, 85 Neb. 739; 124 N. W. 146 (1910).

CHAPTER V

BROKER ACTING FOR BOTH PARTIES

§ 49. Acting for Both Parties a Breach of Contract (p. 49)

Add to footnote 4 (p. 50):

King v. Reed, 24 Cal. App. 229; 141 Pac. 41 (1914); Jacobs v. Beyer, 141 App. Div. 49; 125 N. Y. Suppl. 597 (1910); citing Murray v. Beard, 102 N. Y. 505; 7 N. E. 553; Empire St. Ins. Co. v. Am. Cent. Ins. Co., 138 N. Y. 446; 34 N. E. 200; Everhart v. Searle, 71 Penn St. 256; Farnsworth v. Hemmer, 1 Allen (Mass.) 494; 79 Am. Dec. 756; Walker v. Osgood, 98 Mass. 348; 93 Am. Dec. 168; Rice v. Wood, 113 Mass. 133; 18 Am. Rep. 459; Raisin v. Clark, 41 Md. 158; 20 Am. Rep. 66; Bollman v. Loomis, 41 Conn. 581.

§ 51. The Rule Applies to Exchange of Property (p. 50)

Where in an exchange, the broker has no discretion in respect of any terms or details of the exchange, yet where the principal has the right to expect from the broker the benefit of his knowledge or any information that the broker may possess concerning the property to be taken in exchange by the principal, as for example, the broker's knowledge concerning the value of such property, a secret agreement by the broker to accept commissions from the other party to the exchange would bar the broker of his right to commissions from his principal. Such an instance is said to differ from the cases where the courts have held that a broker may receive double commissions where it appears that he was solely employed to find a purchaser upon terms fixed by the employer, or where it was understood that the broker had nothing else to do but to submit a purchaser to the principal.¹

"The reason for this rule is obvious. In such cases the broker cannot possibly be guilty of bad faith towards the employer, who either has fixed all the terms and conditions under which he will sell his property or else has stipulated personally to attend to all negotiations. There is nothing for the broker to do in such cases but to procure a party who is ready and willing to buy the property upon the terms laid down by the employer."²

"The plaintiff had a lawful right, however, to make a contract

¹Nichols v. Greenstreet, 71 Misc. 196; 130 N. Y. Suppl. 843 (1911); *affd.*, 146 App. Div. 940; 131 N. Y. Suppl. 1131.

²Nichols v. Greenstreet, *supra*.

for commissions from both parties, and he was under no legal or moral obligation to disclose his contract with one to the other. He was given no discretion in the matter, but was simply a broker to bring the parties together. They made their own contract after they were brought together."³

It has been intimated that if a custom exists in any locality that brokers charge both parties commissions where an exchange is made, and the parties knew of the existence of the custom, the broker could recover from both sides.⁴

But this is in reality saying nothing more than that if both parties knew that the broker was to receive pay from both, he is not precluded from recovering.⁵

Add to footnote 6 (p. 51):

Welch v. Garrett, 186 Ill. App. 191 (1914); Hoffhines v. Thorson, 92 Kan. 605; 141 Pac. 253 (1914); Jacobs v. Beyer, 141 App. Div. 49; 125 N. Y. Suppl. 597 (1910). See also § 180.

§ 52. Acting for Both Parties with Their Knowledge (p. 51)

Add to footnote 11:

Ramey v. Sturgeon, 86 S. E. (Ga.) 660 (1915); Madden v. Davis, 192 Ill. App. 575 (1915).

Defendant employed as broker by two principals to procure an exchange of their real estate agreed to give plaintiff one-half of the commissions. Plaintiff at the inception of the negotiations was an accredited agent of one of the principals, but was never an agent of the other principal, and never informed him of the agreement to divide commissions. Plaintiff's principal was informed of, and consented to, the agreement. Held, that the agreement between the brokers was enforceable, for the transaction did not contravene any rule regulating the duties of an agent to his principal, and both principals contracting to pay commissions to defendant on consummation of the exchange, which was done.⁶

§ 54. Broker Vested with No Discretion May Act for Both Parties (p. 52)

Add to footnote 17 (p. 53):

American Security & Investment Co. v. Penney, 129 Minn. 369; 152 N. W. 771 (1915).

³Silberkraus v. Winnie, 158 App. Div. 50; 142 N. Y. Suppl. 887 (1913).

⁴Ramey v. Sturgeon, 86 S. E. (Ga.) 660 (1915). And see Mecum v. Moyer, 166 App. Div. 793, 805; 152 N. Y. Suppl. 385 (1915).

⁵See § 220.

⁶Head note in Hladik v. Allen, 26 Cal. App. 509; 147 Pac. 474 (1915).

§ 55. Compensation of Broker Without Discretion (p. 53)*Add to footnote 19:*

King v. Reed, 24 Cal. App. 229; 141 Pac. 41 (1914); Langford v. Issenhuth, 28 S. D. 451; 134 N. W. 889; Jordan v. Anderson, 155 N. W. (S. D.) 769 (1915).

§ 58. How Question of Double Employment Is Raised
(p. 56)*Add to footnote 23 (p. 56):*

Jacobs v. Beyer, 141 App. Div. 49; 125 N. Y. Suppl. 597 (1910).

Add to footnote 24 (p. 57):

See also Nichols v. Greenstreet, 71 Misc. 196; 130 N. Y. Suppl. 843 (1911); affd. 146 App. Div. 940; 131 N. Y. Suppl. 1131.

On page 57, at end of § 58, add the following paragraphs:

But although the defense is not pleaded, the objection is waived if the broker permits evidence with regard to the double employment to be given without objection.⁷

In any event, the question cannot be raised for the first time on appeal.⁸

Although there is conflict, as noted, concerning the question whether the principal may, without pleading it as a defense, avail himself of the fact that the broker secretly agreed for compensation from the other party, it is said to be incumbent upon the broker, where he has a secret agreement for double commissions, to establish that his agreement for double commissions is not inconsistent with the terms of his original employment.⁹

⁷Jacobs v. Beyer, 141 App. Div. 49; 125 N. Y. Suppl. 597 (1910).

⁸Rees v. Gair, 144 App. Div. 294; 129 N. Y. Suppl. 213 (1911).

⁹Nichols v. Greenstreet, 71 Misc. 196, 130 N. Y. Suppl. 843 (1911); affd., 146 App. Div. 940; 131 N. Y. Suppl. 1131.

CHAPTER VI

BROKER'S RIGHT TO INTEREST IN PROFITS

§ 62. Agent May Not Also Act as Principal (p. 61)

✓¹As a general rule, where one is employed by an owner of property to sell it as his agent, he is not authorized to sell it to himself alone, or together with others, without the consent of the owner."¹

A person cannot be both broker and purchaser. ✓ As soon as he becomes a purchaser or principal, his agency ceases, and his legal authority to act as a broker, *ipso facto*, becomes inconsistent and invalid. He cannot "legally act in such dual relations, however great his ability to turn a somersault."²

"The doctrine of the law that forbids an agent to buy from or sell to himself is not necessarily based on the idea that such deal in dirt is (to speak colloquially) a 'dirty' deal; that is to say, resulted in an injury to or a fraud upon him. But it is rather based on the idea of closing the door to the temptation to commit fraud. It tends to keep the agent's eye single and clear to the rights and welfare of his principal. To allow one acting in the fiduciary relation of agent to buy from or sell to himself is a solecism in the realm of law, for the moral stamina of the average man is inadequate to preserving a fine glow of fidelity to his trust and confidential relation in such transaction, and the interdiction is enforced with a strong hand in courts of justice."³

§ 63. Agent May Not Make Secret Profits (p. 62)

Where a real estate broker having a contract entitling him to half of a \$500 commission to be received by the broker of a vendor of lands, organized a corporation to purchase the lands and falsely represented to the incorporators that the lands could be purchased for \$10,000 subject to a mortgage of \$4,500, when in fact the purchase price was \$9,000 and he only paid \$4,500 in cash on the lands, which was the amount contributed by his fellow-incorporators, and had stock issued to himself for the difference between the real and

¹Syllabus by the court in *Mitchell v. Gifford*, 133 Ga. 823; 67 S. E. 197 (1910).

²*McLaughlin v. Campbell*, (N. J. Ct. of E. & A.) 74 Atl. 530 (1909).

³*Meek v. Hurst*, 223 Mo. 688; 122 S. W. 1022 (1909); citing *Montgomery v. Hundley*, 205 Mo., loc. cit. 148; 103 S. W. 527; 11 L. R. A. (N. S.) 122 *et seq.*; *Moore v. Mandelbaum*, 8 Mich. 434; *Grumley v. Webb*, 44 Mo. 444; 100 Am. Dec. 304; *Evans v. Evans*, 196 Mo., loc. cit. 23; 93 S. W. 969.

the represented price, the transaction comes within the rule prohibiting a broker from making any secret profit out of his principal.⁴

§ 66. Act of Agent in His Own Interest Presumed Injurious (p. 64)

✓ Where a person solicits another to appoint him his agent, there is an implied representation that the former is legally qualified to be such agent, and if the agent has a personal interest in the transaction, not disclosed to his principal, he cannot be said to be legally qualified to act as such agent.⁵

✓ **§ 67. Act of Agent in His Own Interest Voidable, but May Be Ratified (p. 65)**

"The principle that a person occupying a position of agent to purchase may not sell his own property to his principal is so elementary that it need only be stated. It must be quite as elementary and true that if one by misrepresentation or suppression of facts when he ought to speak induces another ignorantly to make a contract appointing the first his agent to buy and conferring upon him discretionary power to purchase his own property, the contract is voidable and even if executed may be rescinded and the money recovered back on restoration of what has been received."⁶

§ 68. Agent May Be Personally Interested with Consent of Principal (p. 65)

Add to footnote 22 (p 66):

Sonnesyn v. Hawbaker, 148 N. W. (Minn.) 476 (1914).

§ 69a. When Minimum Price Is Fixed (p. 67)

✓ While an agent employed to sell property may not sell to himself, it has been suggested that where the agent is authorized to sell the property at a minimum price to the principal, the agent to be entitled to whatever is obtained for the property above that price, the agent may properly purchase the property himself.⁷ It is urged that in such case the minimum price fixed belongs to the principal. All above the minimum price belongs to the agent, and therefore the agent's diligence in securing the best price ob-

⁴Travis v. Travis, 140 App. Div. 191; 124 N. Y. Suppl. 1021 (1910).

⁵Heckscher v. Edenborn, 203 N. Y. 210; 96 N. E. 441 (1911).

⁶Heckscher v. Edenborn, 203 N. Y. 210 at p. 222; 96 N. E. 441 (1911).

⁷See Hutton v. Sherrard, 150 N. W. (Mich.) 135.

tainable would be no benefit to the principal beyond the minimum price. Whether the property sells for \$100 or \$1,000 in excess of the minimum price, the result is the same to the principal. It might also be added that if the agent prefers to take his chances and accept his pay by taking the property and personally turning over to the principal the minimum price, the choice is with the agent. Such a situation, however, must not be confused with cases where the owner fixes a minimum selling price, without any agreement that the agent shall have as compensation all in excess of the minimum price.⁸

§ 70. Broker May Not Lawfully Combine with Others to Secure Secret Profits (p. 67)

✓ When an agent secretly becomes a purchaser for himself from his principal, the vendor, his purchase is void at the election of the vendor, on discovery of the facts, and if the buyer joins the agent in the scheme, knowing the agent's relations to the transaction, the buyer's purchase is equally voidable.⁹

⁸See §§ 215-217.

⁹Waterbury v. Barry, 145 App. Div. 773, 782; 130 N. Y. Suppl. 517 (1911).

CHAPTER VII

GENERAL AUTHORITY OF BROKER

§ 74. Broker's Power to Employ Other Brokers (p. 70)

Add to footnote 5 (p. 71):

Mitchell v. Catlin Co., 71 Misc. 450; 128 N. Y. Suppl. 692 (1911);
Simms v. St. John, 105 Ark. 680; 152 S. W. 284; 43 L. R. A. (N. S.)
796; McCoombs v. Moss, 181 S. W. (Ark.) 907 (1916).

On page 72, at end of second paragraph, add:

✓ "Placed in the hands" of a broker is a familiar form of expression used to indicate the appointment of an agent for the sale of property.¹

On page 74, after "from the former"² add the following three paragraphs:

One broker cannot recover from another broker on a contract to divide commissions on the sale of real property, unless the commissions have been actually received by the broker whom it is sought to charge with liability.²

Where in an action by one real estate broker against another to recover an alleged agreed one-third of the commission received by defendant in the event of the sale, lease, or exchange of a certain parcel of real estate, it is undisputed that a lease of said parcel and another parcel was effected by defendant who received a commission, plaintiff is not entitled to one-third of the entire commission, but at most to one-third of the commission on the parcel covered by the agreement, and a verdict in favor of plaintiff for the full amount of one-third of the entire commission was held clearly against the weight of evidence and the judgment entered thereon was reversed and a new trial granted.³

✓ In such case, the remedy is not the equitable bill for discovery. An agreement between one real estate agent with whom land is listed for sale to divide the profits with another agent if the latter procures a purchaser does not create a partnership between them.

¹Raeder v. Butler, 19 Pa. Super. Ct. 604 (1902).

²White v. Douglas Robinson, Charles S. Brown Co., 153 App. Div. 776; 138 N. Y. Suppl. 992 (1912).

³Kraus v. Cammann, 95 Misc. 262; 158 N. Y. Suppl. 877 (1916).

Equity is without jurisdiction to compel an accounting since the remedy at law is adequate.⁴

§ 75a. Liability of Renting Agent for Violation of Labor Law (p. 76)

One who acts as renting agent for the owner of real estate, and also has control of the property may be convicted of a violation of Section 1275 of the New York Penal Law, making it a misdemeanor to fail to comply with the provisions of the Labor Law, in that he did not light properly a stairway leading to a bake shop in the cellar of a tenement house as required by the Labor Law, a provision of which reads that "The term 'owner' as used in this article shall be construed to mean the owner or owners of the freehold of the premises, or the lessee or joint lessees of the whole thereof, or his, her, or their agent in charge of the property." The court said: "There was evidence that the agent performed acts of control over the property. We think the evidence was sufficient to show that the defendant was more than a mere renting agent, and that he was the agent in charge of the property. Such an agent is amenable to prosecution under the statute. The question of intent in the violation of the statute is immaterial." But the conviction was reversed because of insufficient evidence that the place was not properly or adequately lighted.⁵

It has been held that an agent in charge of property with authority to collect rents and negotiate for and make minor repairs, but without authority to execute leases or to make such repairs or alterations as would be necessary to make the building conform to the requirements of Section 79b of the Labor Law, providing in part that no factory shall be conducted in any building if over two stories in height unless it be provided on each floor with at least two means of exit or escape from fire, is an "agent in charge of the property," within the meaning of said section, and may be punished for the non-observance of its provisions under Section 94 of the Labor Law and Section 1275 of the Penal Law.⁶

The court said: "I do not think that the fact that an agent for a building, like the defendant in the case at bar, may not have authority to make the required alterations is by any means decisive of the question. Section 79b does not provide that every tenant-factory shall be equipped with the two described means of exit on each floor.

⁴Wilson v. McVay, 193 Ill. App. 417 (1914).

⁵People v. Pullman, 166 App. Div. 99; 151 N. Y. Suppl. 741 (1915).

⁶People v. Pease & Elliman, Inc., 173 App. Div. 752, 758 (1916).

It provides only that no factory shall be conducted in any building theretofore erected unless the two means of exit shall be provided. It is not the failure to equip the building in the prescribed manner that violates the law, it is the maintenance of a factory in a building not properly equipped, and the violation can be terminated either by altering the building or by discontinuing the factory. Under Section 94 both the actual owner and the respective tenants are made responsible if a factory is conducted in a building in violation of Section 79b, and I think it is clear that the agent in charge of the building should likewise be held responsible.

"The agent knows whether the building complies with the requirements of Section 79b. He also knows whether the leases permit the tenants to conduct factories in the building. If factories are permitted in the leases in a building not conforming to the law there is no reason why the agent should not be held responsible. If a tenant conducts a factory without permission to do so in his lease in violation of the law the agent is sure to find it out and it is his duty to see that the violation is stopped. If he continues to act as agent for the building, knowing that the law is being violated there, he should also be held responsible for the violation. His liability is based upon the existing condition of affairs and not upon the owner's failure to make alterations."

Two of the five judges of the Appellate Division dissented, saying in part: "It seems to me that to hold, under these circumstances, that the defendant was an 'agent in charge of the property' is to strain the language of the statute beyond all reason. An agent 'in charge of' property must mean an agent who has some authority and responsibility regarding it, and when an agent is sought to be held criminally liable for having failed to do something regarding the property, it should at least appear that the terms of his agency were such that he had the power to do that for the non-doing of which he is sought to be punished as a criminal. It is no answer to say that he ought to insist upon having such power, for the terms of an agency are in general, to be determined by the principal. The act is doubtless a highly beneficial one which should be strictly enforced, but not by prosecuting as violators persons who had no power of compliance, and are, therefore, innocent of wrongdoing."

§ 78. Insurance Brokers (p. 77)

See also § 11 as to license requirements.

An insurance broker may occupy such relations to an insurance

company as to be its agent in many ways, including the receipt of premium moneys.⁷

"It is settled beyond controversy in this state that a broker who is employed to secure insurance is the agent for the insured and not for the company."⁸

"It is equally well settled that a broker or agent employed merely for the purpose of procuring insurance has no implied authority to cancel or to accept an operative notice of cancellation."⁹

Brokers are liable where they undertake to procure insurance and utterly neglect to obtain any insurance, or fail to carry out material provisions of their agreement, and a loss results. In such a case, they are said to be liable for as much as would have been covered by the insurance which they agreed to procure.¹⁰

A fire insurance agent employed to negotiate a policy who, having knowledge that his principal's property is already insured, procures and delivers to his principal another policy containing a clause that it is void in case of other insurance not expressly permitted in the new policy, is guilty of negligence and liable to his principal, for the resulting loss. The failure of the principal to examine the policy delivered by his agent and discover the defect does not exonerate the agent, or constitute a waiver of his claim, for waiver can only exist where there is knowledge on the part of the person making the waiver.¹¹

"It seems to be settled law that if an agent is personally interested in the property insured, no policy issued by him thereon, or act done by him in connection therewith, binds the insurance company, unless known and assented to by it."¹²

This is so because the law does not permit an agent to bind two

⁷Smith Lumber Co. v. Colonial Assurance Co., 172 App. Div. 149; 158 N. Y. Suppl. 198 (1916).

⁸Citing Northrup v. Piza, 43 App. Div. 284; 60 N. Y. Suppl. 363; *affid.* without opinion, 167 N. Y. 578; 60 N. E. 1117; Morris v. Home Ins. Co., 78 Misc. Rep. 303; 139 N. Y. Suppl. 674.

⁹Condon v. Exton-Hall Brokerage & V. Agency, 80 Misc. 369, 371; 142 N. Y. Suppl. 548 (1913); Tacoma L. & T. Co. v. Firemen's Fund Ins. Co., 151 Pac. 91 (Wash. 1915); Richards on Insurance (3rd ed.), 388, 389.

¹⁰Rezac v. Zima, 96 Kan. 752; 153 Pac. 500 (1915); Milliken v. Woodward, 64 N. J. L. 444; 45 Atl. 796; Lindsay v. Pettigrew, 5 S. D. 500; 59 N. W. 726; Sawyer v. Mayhew, 51 Me. 398; Diamond v. Duncan, (Tex. Civ. App.) 138 S. W. 429; Malley v. Frye, 21 App. D. C. 105; Criswell v. Riley, 5 Ind. App. 496; 30 N. E. 1101; 32 N. E. 814; Backus v. Aemes, 79 Minn. 145; 81 N. W. 766; Brick Co. v. Hogsett, 73 Mo. App. 432; Note, 38 L. R. A. (N. S.) 631.

¹¹Israelson v. Williams, 166 App. Div. 25; 151 N. Y. Suppl. 679 (1915).
¹²Dull v. Royal Ins. Co., 159 Mich. 671; 124 N. W. 533; 16 Det. Leg. N. 975 (1910); citing 1 May on Insurance, § 125; 3 Cooley's Briefs on Insurance, 2529; 22 Cyc. 1435; Zimmerman v. Ins. Co., 110 Mich. 399; 68 N. W. 215; 33 L. R. A. 698; Spare v. Home Mut. Life, (C. C.) 19 Fed. 14; Ritt v. Ins. Co., 41 Barb. 353; Arispe Mercantile Co. v. Capital Ins. Co., 133 Iowa 274; 110 N. W. 593; 9 L. R. A. 1084; Greenwood v. Ins. Co., 72 Miss. 46; 17 So. 83; Wildberger v. Hartford (N. S.) 1084; Greenwood v. Ins. Co., 72 Miss. 338; 17 So. 282; 28 L. R. A. 220; 48 Am. St. Rep. 558; Fire Ins. Co., 72 Miss. 338; 17 So. 282; 28 L. R. A. 220; 48 Am. St. Rep. 558; N. Y. Central Ins. Co. v. Natl. etc., 14 N. Y. 85; Rockford Ins. Co. v. Winfield, 57 Kan. 576; 47 Pac. 511; Glens Falls Ins. Co. v. Hopkins, 16 Ill. App. 220; British Ass. Co. v. Cooper, 6 Colo. App. 25; 40 Pac. 147.

parties having opposite interests, nor to be a party on the one side and the agent of the opposite party on the other, unless both parties know of the dual relation and assent to it.¹³

Add to footnote 23 (p. 77):

Singer v. National Fire Insurance Co., 154 App. Div. 783; 139 N. Y. Suppl. 375 (1913).

§ 78a. Compensation for Appraisals and Giving Expert Testimony (p. 78)

Brokers are often called as witnesses in trials to give testimony as to values of property, situation, character, and surroundings of property, etc., and the question arises whether the broker is in such cases entitled to more than the ordinary witness fees. If the broker's services consist entirely of testifying at the trial to facts within his knowledge, then no recovery may be had by him in the absence of an express promise beyond the ordinary witness fees. But this rule does not go to the extent of obliging a person to give technical expert testimony without reasonable compensation. The law regards such knowledge as the capital of the person possessing it which a litigant has no right to utilize without paying for it. But where one voluntarily testifies on request without insisting on compensation as a condition of giving his evidence, he could hardly afterward hold the person on whose behalf he testified, to more than the ordinary witness fees. Where, however, the services for which compensation is claimed are not for the giving of the testimony but for the time and labor spent in making the necessary investigation in order to qualify him as an expert witness, such time and labor are services rendered outside and beyond services as a witness, and "it has been repeatedly held that professional persons cannot be required to make any examination or preliminary preparation in order to better qualify themselves as experts, and that when, on request, such services are performed for another, extra compensation may be demanded upon an *implied* promise in the absence of an express promise of compensation. The authorities holding this doctrine in various forms are numerous."¹⁴

¹³See §§ 47, 59.

¹⁴*Tiffany v. Kellogg Iron Works*, 59 Misc. 113; 109 N. Y. Suppl. 754 (1908); citing *Brown v. Travelers' Life & Accident Ins. Co.*, 26 App. Div. 544; 50 N. Y. Suppl. 729; *People v. Montgomery*, 13 Abb. Pr. (N. S.) 207 (N. Y.); *Schofield v. Little*, 2 Ga. App. 286; 58 S. E. 666; *Board of Comm. v. Lee*, 3 Col. App. 177; 32 Pac. 841; *Barrus v. Phaneus*, 166 Mass. 123; 44 N. E. 141; 32 L. R. A. 619; *Flinn v. Prairie Co.*, 60 Ark. 204; 29 S. W. 459; 27 L. R. A. 669; 46 Am. St. Rep. 168; *St. Francis Co. v. Cummings*, 55 Ark. 419; 18 S. W. 461; *Summers v. State*, 5 Tex. App. 365; 32 Am. Rep. 573; *Ex parte Dement*, 53 Ala. 389; 25 Am. Rep. 611.

CHAPTER VIII

REVOCATION OF BROKER'S AUTHORITY

§ 80. Termination of Agency by Mutual Consent (p. 79)

Where the broker is employed for a definite time, as where he is to sell the property within a specified time, he is not entitled to compensation if he fails to procure a purchaser within the time.¹

This is so though a sale is subsequently made to a purchaser who negotiated with the broker within such time, provided the owner acted in good faith, and did not interfere with the broker's efforts to make the sale within the specified time.²

§ 82. Termination of Agency at Pleasure of Principal (p. 80)

Add to footnote 3:

Howard v. Street, 125 Md. 289; 93 Atl. 923 (1915).

Add to footnote 5:

Newman v. Dunleavy, 149 Pac. 970; §5460, Rev. Codes Mont.

§ 83. Termination by Principal After Lapse of Reasonable Time (p. 81)

The broker's authority may be expressly revoked, but, unless so revoked, it continues for a reasonable time. There are authorities which hold that in order to establish a contract, an offer must be accepted as made, and that a counter-offer is a rejection. That rule, however, does not apply to offers made by a broker, for the reason that the relation between the broker and the employer desiring to sell is not such as involves an offer by the owner to sell his land to the broker. What the owner really does is to offer to employ the broker, and that offer is accepted, and the contract of employment becomes complete when the broker undertakes to act as broker and to use his best efforts to find a buyer. The broker does not, therefore, put an end to his employment by reporting offers lower than the price named by the owner, and this is especially true where the broker has been expressly directed by the owner to submit all offers which may come to the broker.³

¹Hughes v. Daniel, 65 So. (Ala.) 518 (1914).

²Murray v. Miller, 166 S. W. (Ark.) 536 (1914).

³Martin v. Crumb, 216 N. Y. 500; 111 N. E. 62 (1916).

In at least one state it has been sought to regulate the duration of the employment by statute. In Maine it is provided that "all contracts entered into after August 1, 1911, for the sale or transfer of real estate, and all contracts whereby a person, company or corporation becomes an agent for the sale or transfer of real estate, shall become void in one year from the date such contract is entered into unless the time for the termination thereof is definitely stated."⁴

Where the principal consummates a sale brought about by the broker, the principal cannot claim that the sale was not made within a reasonable time.⁵

Where brokers were put in charge of selling 258 lots under an agreement which specified no particular duration, and the brokers had sold only two of the lots in four months, it was held that, "they had demonstrated their inability to perform, even though they were entitled to a reasonable time within which to do so, and for that reason the defendants (the principals) were justified in terminating the contract" by notice to the broker to that effect, and that as the authority to sell was not coupled with an interest it could be revoked at any time before a sale took place, if the principal acted in good faith without incurring any liability by the principal.⁶

At page 82, at end of text, add:

See *Rand v. Contrite*, 64 Ill. App. 208 (1896).

§ 85. Revocation of Agency by Principal Must Be in Good Faith (p. 84)

Where the evidence is conflicting, the good faith of the principal in terminating the broker's authority and at once selling to the same purchaser through another broker, is a question of fact for the jury.⁷

§ 87. Termination of Agency by Previous Sale (p. 86)

Add the following footnote:

See § 237 of Supplement.

Add to footnote 27:

Teal v. McKnight, 110 La. 256; 34 So. 434 (1903).

Add to footnote 28:

Smith v. Fowler, 57 Tex. Civ. App. 356; 122 S. W. 598 (1909);
White v. Hoskins, 121 Iowa 354; 96 N. W. 876 (1903).

Add to footnote 29:

Schusterman v. Kraus, 148 App. Div. 727; 132 N. Y. Suppl. 758 (1912).

⁴Ch. 157, L. 1911, Me. See *Odlin v. McAllaster*, 112 Me. 89; 90 Atl. 1086 (1914).

⁵*Morgan v. Keller*, 194 Mo. 680 (1905).

⁶*O'Hara v. Murray*, 144 App. Div. 113; 128 N. Y. Suppl. 1009 (1911); citing *Stier v. Imperial Life Ins. Co.*, 58 Fed. Rep. 843.

⁷*L'Ecluse v. Field*, 154 App. Div. 685; 139 N. Y. Suppl. 383 (1913).

Part II—Commissions and Their Recovery

CHAPTER IX

GENERAL RULES AS TO COMMISSIONS

§ 97. Respective Rights of Brokers when Several Are Employed (p. 95)

"Where the property is placed in the hands of several brokers for sale, the owner is bound to pay the broker who in fact effects the sale, and cannot exercise his option."¹

Where brokers work on a deal as quasi-partners or joint adventurers, payment of the whole amount due to one of them as agreed would seem to preclude recovery by the other from the principal, and leave at best a cause of action between the joint adventurers.²

Upon an issue in an action between two real estate brokers as to whether there was an agreement between them to divide the commissions for a certain sale, evidence of a usage among real estate brokers that two making a sale divide the commission equally, unless a different arrangement is made, is not admissible.³

Add to footnote 6 (p. 96):

Leadville Mining Co. v. Hemphill, 149 Pac. (Ariz.) 384 (1915); Idelson v. Robinson, 27 Colo. App. 507; 150 Pac. 322 (1915); Groskin v. Moore, 249 Pa. 242; 94 Atl. 1057 (1915); McCoombs v. Moss, 181 S. W. (Ark.) 907 (1916).

Add to footnote 6 (p. 96):

Cissel v. Hayden, 41 App. D. C. 477 (1914).

§ 98. Rule as to Commissions when Several Brokers Are Employed (p. 97)

At head of text insert the following two paragraphs:

✓ Where real property is given to several brokers for sale or exchange, the one first producing a customer and consummating a sale or exchange is entitled to the broker's commissions.

¹Beougher v. Clark, 81 Kan. 250; 106 Pac. 39 (1910); citing Eggleston v. Austin, 27 Kan. 245; Votaw v. McKeever, 76 Kan. 870; 92 Pac. 1120; 19 Cyc. 260.

²Jenkins v. Mahoney, 142 App. Div. 653; 127 N. Y. Suppl. 573 (1911).

³Syllabus by the court in Smith v. Barringer, 37 Minn. 94; 33 N. W. 116 (1887).

And where, in such a case, negotiations have been had by one of the brokers with a purchaser and afterwards a contract is made with the same purchaser by other brokers on other terms than those suggested by the former broker, and the latter brokers actually bring the parties together and are the procuring cause of the contract, in the absence of bad faith on the part of the vendor they alone are entitled to commissions.⁴

§ 100. Liability for Commissions when Principal Negotiates Sale (p. 101)

Add to footnote 23:

Blumenthal v. Bridges, 91 Ark. 212; 120 S. W. 974; 24 L. R. A. (N. S.) 279.

⁴Farber v. Cohn, 74 Misc. 396; 132 N. Y. Suppl. 348 (1911).

CHAPTER X

BROKER MUST BE EMPLOYED

§ 104. Volunteers Not Entitled to Commission (p. 105)

✓ The basis for claim for commissions is the broker's employment.¹

✓ Where a real estate broker acting for another who desires to purchase real estate approaches the owner of certain property and negotiates for the purchase thereof, no contract will be implied therefrom on the part of such owner to pay the broker.²

Where a person is regularly engaged in the business of real estate brokerage, conscious acceptance of his services in that capacity may raise an implied contract to pay therefor, but the same rule would not otherwise apply.³

Add to footnote 1:

See *Belden v. Kellwood Realty Compaay*, 74 Misc. 61; 131 N. Y. Suppl. 580 (1911), as to attempt of purchaser or tenant to force services of selected broker upon vendor or owner.

§ 107. Manner of Employment (p. 108)

Frequently the broker is requested by a person desirous of purchasing property to seek the owner and endeavor to negotiate a sale. The broker thereupon ascertains who the owner is and informs him that he represents a person who may purchase the property and that if a sale is effected the broker expects the seller to pay a commission. In such case the broker, having told the seller that he, the broker, represents the purchaser, is entitled to the commission if the seller accepts the offer of purchase. ✓ The owner may accept or reject the offer, as he chooses, but if he accepts it he must do so subject to the condition that commissions be paid as stated.⁴

Oral agreements between a real estate broker and his principal are merged in a subsequent written contract of employment and are not binding when inconsistent with the writing.⁵

§ 111. Ratification by Implication (p. 111)

Add to footnote 27, (p. 112):

Sanders v. Schultheis, 79 Misc. 241; 139 N. Y. Suppl. 866 (1913).

¹*Miller v. Waclark Realty Co.*, 139 App. Div. 47; 123 N. Y. Suppl. 837 (1910).

²*Turek v. Opava*, 192 Ill. App. 270 (1915).

³*Hevia v. Wheelock*, 155 App. Div. 387; 140 N. Y. Suppl. 351 (1913).

⁴See *Dickinson v. Tysen*, 209 N. Y. 395 (1913); *Foss v. N. Y. C. etc., R. R. Co.*, 161 App. Div. 681; 146 N. Y. Suppl. 930 (1914); *affd.*, 217 N. Y. 727 (1916), no opinion. See § 142 from which these cases are quoted.

⁵*Krisch v. Day*, 150 App. Div. 154; 134 N. Y. Suppl. 803 (1912).

CHAPTER XI

BROKER MUST BE PROCURING CAUSE OF SALE

§ 116. Procuring Cause (p. 117)

✓ "The broker is entitled to his commission if he is the primary, proximate, and procuring cause of the sale."¹

✓ The broker must show he was the procuring cause of the sale.²

Add to footnote 13 (p. 117):

Hayden v. Ashley, 86 Wash. 653; 150 Pac. 1147 (1915).

Add to footnote 14 (p. 118):

Koliha v. Jonas, 98 Neb. 790; 154 N. W. 556 (1915). And so if the husband of the owner declines to join in a contract of sale. Joice v. Norman, 192 Ill. App. 285 (1915). See also §§ 167, 191.

Add to footnote 15 (p. 118):

Cf. Laubscher v. Mixell, 153 N. W. (Iowa) 335 (1915), as to homestead lands.

§ 117. What is Required to Constitute a Broker a "Procuring Cause" (p. 118)

✓ To earn his commission the broker need only produce a ready, willing, and able purchaser.³

This rule has been codified in some states, as for example in Georgia, where it is provided that "the broker's commissions are earned when, during the agency, he finds a purchaser ready, able and willing to buy, and who actually offers to buy on the terms stipulated by the owner."⁴

Add to footnote 16 (p. 119):

Davidson v. Stocky, 202 N. Y. 423; 95 N. E. 753 (1911); Tanenbaum v. Boehm, 202 N. Y. 293; 95 N. E. 708 (1911); Hammack v. Friend, 180 Mo. App. 472; 166 S. W. 647 (1914); Cavanaugh v. Conway, 36 R. I. 571; 90 Atl. 1080 (1914); Beougher v. Clark, 81 Kan. 250; 106 Pac. 39 (1910); Betz v. Land Co., 46 Kan. 45; 26 Pac. 456; Stewart v. Fowler, 53 Kan. 537; 36 Pac. 1002; Marlatt v. Elliott, 69 Kan. 477; 77 Pac. 104; Gelatt v. Ridge, 117 Mo. 553; 23 S. W. 882; 38 Am. St. Rep. 683.

In Goodmanson v. Rosenstein, 144 Ill. App. 243 (1908), it was said that when the broker produced a purchaser ready, willing, and able to buy he thereby earned his commission.

¹Beougher v. Clark, 81 Kan. 250; 106 Pac. 39 (1910).

²Owcharoffsky v. Trustees of W. C. M. Church, 86 Misc. 36; 148 N. Y. Suppl. 138 (1914); May Co. v. Holland Holding Co., 156 App. Div. 162; 140 N. Y. Suppl. 1061 (1913); Handy v. Van Cortlandt Realty Co., 156 App. Div. 110; 140 N. Y. Suppl. 1081 (1913).

³Watkins v. Thomas, 141 Mo. App. 263; 124 S. W. 1063 (1909).

⁴§3587, Ga. Code (§3015, Code, 1895).

§ 119. General Rule as to "Procuring Cause" (p. 124)

—The broker is not required to procure an enforceable contract of sale with the purchaser; it is enough if he produces a purchaser ready, willing, and able to buy the property on the principal's terms.⁵

§ 121. Effect of Promises to Pay Commission (p. 126)

2 Agreeing in the contract of sale who is the broker is nothing more than an evidentiary fact by way of admission that the broker named brought about the sale.⁶ Such a promise is executory in character, and if the services have already been rendered when such promise is made, it rests upon no consideration and is unenforceable.⁷

In *Petry v. Haves*,⁸ Mr. Justice Marean of the New York Supreme Court says, "The clause inserted in the contract for exchange touching the payment of commissions to brokers is not a part of the contract. It in no way relates to the obligations of the contracting parties toward each other. Neither is it a promise to the brokers to pay commissions which can be made the foundation of an action by the brokers. It is at the best only a declaration of fact to which the parties appended their signatures and which may be used as evidence against them. Whenever and wherever it may be offered in evidence against them or either of them it may be met by evidence that they or either of them against whom it is offered signed the instrument in ignorance that such clause had been inserted therein. Such proof being made, the clause is deprived of all probative force. There is therefore no reason for this action to eliminate the clause in question from the contract and none for staying the brokers' suit for commissions until that can be done." In this case the clause was, "\$150 commission to be paid to Thos. J. Walsh and James K. Knudson, Jr. on closing of this title for acting as brokers in this exchange."

At page 127, at the end of § 121, add: And so, inserting a clause in a lease to the effect that A was the broker in the transaction, cannot affect the rights of another broker if he had any rights, neither can the proposed tenant, by stating that his attention had been called to the property by the broker not mentioned in the lease, compel the landlord to accept such broker as the landlord's broker.⁹ In other words, if a broker is really the pro-

⁵*Schweid v. Storandt*, 157 App. Div. 855; 143 N. Y. Suppl. 161 (1913).

⁶*Hevia v. Wheelock*, 155 App. Div. 387; 140 N. Y. Suppl. 351 (1913).

⁷*Id.*

⁸44 N. Y. Law J. 1536 (Jan. 13, 1911).

⁹*Belden v. Kellwood Realty Co.*, 74 Misc. 61; 131 N. Y. Suppl. 580 (1911).

curing cause, he cannot be deprived of his rights simply because the owner of the property insists on saying in the lease, or in the contract of sale, that someone else was the broker, and, on the other hand, the owner of the property cannot be forced to pay commission to a broker merely because the proposed purchaser or the proposed tenant claims that such broker called his attention to the property, unless such broker has been employed by the owner of the land, or his negotiations have been ratified to such an extent as to make the ratification equivalent to employment.¹⁰

§ 122. Unsuccessful Efforts (p. 127)

The broker must be the procuring cause of the sale.¹¹

§ 125. Effort Required of Broker (p. 130)

✓ A mere "paper offer" to buy is not sufficient. The broker must show that his proposed purchaser was ready, willing and able to carry out the offer.¹²

"To entitle a broker to sell or to find a purchaser of real estate, to recover commissions, where no contract of sale is executed by his employer and the purchaser, it is incumbent upon him to show not only that he *procured* a person who was ready, willing and able to purchase the property upon the terms authorized by his employer, but also that his employer was advised of that fact and given an opportunity to complete the sale to the proposed purchaser, and that the sale was not consummated because of his employer's default. The mere fact that the broker *found* a willing and capable purchaser is not enough. It is obvious that he is not entitled to compensation for such services unless his employer is afforded an opportunity to receive the benefits of them."¹³

It may be said generally, that the broker's right of recovery is not dependent upon the knowledge of the principal that the purchaser came to purchase in consequence of information obtained through the broker.¹⁴

There is "a line of cases, of which *Sussdorff v. Schmidt*¹⁵ is a leading one, in which a broker has been held to be entitled to a

¹⁰See § 103.

¹¹*Handy v. Van Cortlandt Realty Co.*, 156 App. Div. 110; 140 N. Y. Suppl. 1081 (1913); *May Co. v. Holland Holding Co.*, 156 App. Div. 162; 140 N. Y. Suppl. 1061 (1913).

¹²*Morgan v. Zanger*, 153 N. W. (Mich.) 1079 (1915).

¹³*Coppage v. Howard*, 127 Md. 512; 96 Atl. 642 (1916).

¹⁴*McLaughlin v. Campbell* (N. J. Ct. of E. & A.), 74 Atl. 530 (1909); citing *Vreeland v. Vetterlein*, 33 N. J. L. 247; *Derrickson v. Quimby*, 43 N. J. L. 373; *Somers v. Westcoat*, 66 N. J. L. 551, 553; 49 Atl. 462; *Sussdorff v. Schmidt*, 55 N. Y. 320.

¹⁵55 N. Y. 319.

commission, if he is in fact the procuring cause of the sale, even though he did not actually bring the parties together, and was not present when the sale was consummated. That a broker may under such circumstances be entitled to compensation is not to be doubted, but to justify a recovery in such a case it must be made abundantly clear that the broker was the efficient agent or procuring cause, not alone of directing the purchaser's attention to the property, but of effecting the sale. He must not only find the purchaser, but the sale must proceed from his efforts acting as broker. In short, it must affirmatively appear that the purchaser was induced to apply to the owner through the means employed by the broker."¹⁶

A clause in a contract with a broker for commissions on the sale of land to any person who became interested through the broker's efforts, does not apply to a person who had been interested theretofore.¹⁷

Where a written contract employing a broker to procure purchasers for lands provided that he should be entitled to commissions on sales made to purchasers whom he brought to his principal's office, or where he was the procuring cause of the sale, and not otherwise, he is not entitled to commissions where he merely talked upon the street to a person who subsequently became a purchaser and gave him literature describing the lands, but with whom he never had any subsequent communication.¹⁸

Where a broker was employed to sell certain real estate to a municipality, and procured its assent to purchase on the terms prescribed, but subsequently, in order to overcome a supposed defect in the title, the property was taken in condemnation proceedings for a sum in excess of the amount the broker was authorized to sell for, he is entitled to recover his agreed commission from his employer to whom the award was paid.¹⁹

Add to footnote 43:

Handy v. Van Cortlandt Realty Co., 156 App. Div. 110; 140 N. Y. Suppl. 1081 (1913); May Co. v. Holland Holding Co., 156 App. Div. 162; 140 N. Y. Suppl. 1061 (1913).

§ 126. Presence of Broker (p. 131)

Add to footnote 52:

Morrison v. Hale, 96 Atl. (N. H.) 298 (1915).

Add to footnote 58 (p. 132):

Travis v. Bowron, 138 App. Div. 554; 123 N. Y. Suppl. 290 (1910); citing Lloyd v. Matthews, 51 N. Y. 124.

¹⁶Haase v. Ullman, 148 App. Div. 40, 43; 131 N. Y. Suppl. 1050 (1911).

¹⁷May v. Tighe, 152 N. W. 23 (1911).

¹⁸Krisch v. Day, 150 App. Div. 154; 134 N. Y. Suppl. 803 (1912).

¹⁹Tyler v. Seiler, 86 Misc. 185; 136 N. Y. Suppl. 394 (1912).

§ 127a. Notifying Principal That Customer is Broker's Client (p. 134)

"The weight of authority, outside of Minnesota, is to the effect that, if a broker, even though he did not have the exclusive agency, was in fact the procuring cause of the purchase, and would otherwise be entitled to commissions, he will not be deprived thereof by the fact that the owner at the time of the sale did not know of his instrumentality in procuring the purchaser."²⁰

But where the broker, by negligence or design, keeps his principal in ignorance of the fact that a proposed purchaser was the customer of the broker, and the principal was thus led to recognize another as the broker who brought about the sale, it may operate to deprive the first broker of any claim for commissions, if such complication is attributable to the fault of the first broker.²¹

But where a landowner employed a broker to secure a purchaser and agreed that he should have commissions if a sale were made to a certain named person, whether effected between the broker and the customer, or consummated by inducing the customer to negotiate directly with the owner, the broker may recover commissions where the sale was effected in the latter way although he did not notify the owner that he sent the customer to him.²²

§ 128. Advertising (p. 134)

✓"The services of the broker must be the direct and proximate cause, not the indirect, accidental or remote cause of bringing the customer to his principal.²³ ✓Of course, where a broker advertises property and a customer is procured thereby, that is the direct result of the efforts of the broker."²⁴

But merely including the property in a catalogue of the broker's showing what property the broker has for sale, would not entitle the broker to a commission on a sale to one who had seen the catalogue, unless the broker is also the proximate or procuring cause of the sale.²⁵

²⁰From Editorial note to *Quist v. Goodfellow*, 8 L. R. A. (N. S.) 153, case reported 99 Minn. 509; 110 N. W. 65 (1906); *Colonial Trust Co. v. Pacific Co.*, 158 Fed. 280 (1907); *Jungeblut v. Gindra*, 134 App. Div. 291; 118 N. Y. Suppl. 942 (1909); *Millan v. Porter*, 31 Mo. App. 576 (1888). See also §§ 125, 130.

²¹*Courtney v. Rhodes*, 148 App. Div. 799; 133 N. Y. Suppl. 363 (1912). See also §§ 96, 151.

²²*Walker v. Sterry*, 146 App. Div. 332; 130 N. Y. Suppl. 801 (1911).

²³See *Cole v. Kosch*, 116 App. Div. 715; 102 N. Y. Suppl. 14; *Meyer v. Improved Prop. Holding Co.*, 137 App. Div. 691; 122 N. Y. Suppl. 296; *Boyd v. Improved Prop. Holding Co.*, 135 App. Div. 623; 120 N. Y. Suppl. 850; *Sibbald v. Bethlehem Iron Co.*, 83 N. Y. 373, 378; 38 Am. Rep. 441.

²⁴*Lord v. United States Transportation Co.*, 143 App. Div. 437, 454, 455; 128 N. Y. Suppl. 451 (1911); citing *Kiernan v. Bloom*, 91 App. Div. 429; 86 N. Y. Suppl. 899; *Sussdorff v. Schmidt*, 55 N. Y. 319.

²⁵*Way v. Turner*, 127 Md. 327; 96 Atl. 676 (1915).

Untrue and misleading advertisements are made a criminal offense in some states, as in New York, where it is provided that, "If any person, firm, corporation or association, or agent or employee thereof, with intent to sell or in any wise dispose of merchandise, real estate, service, or anything offered by such person, firm, corporation or association, or agent or employee thereof, directly or indirectly, to the public for sale or distribution, or with intent to increase the consumption thereof, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or an interest therein, knowingly makes, publishes, disseminates, circulates, or places before the public, or causes, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this state, in a newspaper, magazine or other publication, or in the form of a book, notice, circular, pamphlet, letter, handbill, poster, bill, sign, placard, card, label, or tag, or in any other way, an advertisement, announcement or statement of any sort regarding merchandise, service or anything so offered to the public which contains any assertion, representation or statement of fact that is untrue, deceptive or misleading, or that amounts to an offer to sell, barter or exchange real estate, by means of prizes, rewards, distinctions, or puzzle methods, such person, corporation or association, or the members of such firm, or the agent of such person, corporation, association or firm, shall be guilty of a misdemeanor, punishable by a fine of not less than twenty-five dollars nor more than one thousand dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment."²⁶

§ 130. Consummation of Sale by Principal (p. 137)

"When a broker calls the attention of a prospective purchaser to property which he has been authorized to offer for sale, and communicates that fact and the name of such purchaser to the owner, the owner cannot defeat the broker's claims to commission by taking up and completing the negotiations himself, unless before so doing he in good faith terminates the contract of employment."²⁷

Add to footnote 77:

Beougher v. Clark, 81 Kan. 250; 106 Pac. 39 (1910); McClave v. Paine, 49 N. Y. 561; 10 Am. Rep. 431; Hinds v. Henry, 36 N. J. Law 328; Dolan v. Seanlan, 57 Cal. 261; Gelatt v. Ridge, 117 Mo. 553; 23 S. W. 882; 38 Am. St. Rep. 683; Briggs v. Hall, 24 Cal. App. 586; 141 Pac. 1067 (1914); Hawkins v. Taylor, 186 Ill. App. 365 (1914).

²⁶§ 421, N. Y. Penal Law, as amended by Chapter 569, Laws 1915.

²⁷Travis v. Bowron, 138 App. Div. 554; 123 N. Y. Suppl. 290 (1910); Ewan v. Power, 165 Ky. 806; 178 S. W. 1092; Howard v. Street, 125 Md. 289; 93 Atl. 923.

CHAPTER XII

SALE MUST BE ON EMPLOYER'S TERMS

✓ § 132. - Purchaser Must Agree to Seller's Terms (p. 141)

Where the broker succeeds in procuring a person ready, willing, and able to purchase on the terms of the vendor, and the vendor then imposes new conditions to which the purchaser will not accede, and the whole matter is then abandoned, the broker has nevertheless earned his commission.¹

"In the absence of a special agreement, the services rendered by a broker to an owner of real estate generally fall into one of two categories: (1) Where the owner has given the broker the full and complete terms upon which he is willing to sell his property, and not merely the asking price thereof; (2) where the owner has his property for sale, and may or may not have set an asking price thereon, but does not fix the terms of the transaction, leaving them to be determined thereafter. In the first case the broker's duty is fulfilled and his commissions are earned when he produces a customer ready, willing and able to comply with all the terms fixed by the owner; should the latter then desire to add to the terms already imposed, the additional conditions must be germane to the original ones, if they are to furnish a sufficient reason for the refusal to pay the broker in case of the customer's refusal to agree to any modification of the original terms. In the second case, the broker's commissions are not earned until the customer produced by him reaches an agreement with the owner upon the price and terms upon which a sale can be made. This of course does not mean that a contract in writing must be signed by the parties, but that their minds must meet not only upon the price but upon the essential terms of an agreement to purchase."²

Where the only terms given the broker were the price and the size of the property 20 x 100, and the broker produced a proposed buyer who refused to contract because the vendor presented a contract describing the property as 20 x 100 "more or less," the addition of the words "more or less" were held not such a modifi-

¹Hutchinson v. Plaut, 218 Mass. 148; 105 N. E. 1017 (1914). See also § 150.

²Arnold v. Schmeidler, 144 App. Div. 420, 427; 129 N. Y. Suppl. 408 (1911).

cation of or departure from the terms given to the broker, as to justify a recovery by him upon his purchaser's refusal to take.³

Add to footnote 6 (p. 142):

See also § 150.

✓ **§ 133. All of Seller's Terms Must be Met** (p. 142)

It has been said that the broker must procure a purchaser on all the terms of the principal even as to the date of closing title. Where no terms are laid down, the broker is said to take the hazard. As ordinarily the time of closing title is not stated when the broker is engaged, it would seem that a reasonable rule would be that the broker is not entitled to commissions where the vendor had fixed the time for closing title as one of the terms of sale, and the purchaser refused to agree thereto, or where the sale is not consummated because the vendor and purchaser were unable to agree upon a time fixed for closing of title, and no meeting of the minds resulted because of that circumstance. It would seem exceedingly harsh, if the vendor had at no time mentioned anything about the time for closing title, and the broker then brought a customer ready, willing, and able to purchase at the price and upon the terms fixed by the vendor, to then permit the vendor to defeat a suit for commissions, merely because no time for closing title had been fixed in the offer presented.

Where the owner had in writing authorized a broker to secure a customer for \$25,000, "\$10,000 of which must be paid in cash" and \$15,000 by assuming a mortgage, and that "this contract expires and becomes null and void at midnight October 26, 1912," it undoubtedly would be true that if the broker produces a purchaser and notifies the owner within the time of the contract, it would not be essential that the purchaser pay the cash payment before the expiration of the term of the contract unless the contract specifically so provided. And where a broker produced a customer who was ready to take the property at the price and subject to the mortgage instead of assuming the mortgage, the court seemed to think that if the customer had paid the cash payment during the life of the contract, the court would have been willing to consider whether or not the owner, by his subsequent conduct, waived the provision by taking the property subject to the mortgage instead of assuming the mortgage, as the contract originally provided.⁴

Where in an action by a real estate broker to recover commissions, it appears that he was only authorized by the defendant,

³Levy v. Sonneborn, 78 Misc. 50; 138 N. Y. Suppl. 285 (1912).

⁴Wittwer v. Hurwitz, 216 N. Y. 259; 110 N. E. 433 (1915).

an attorney at law, acting as agent for the owners, to find a purchaser for the whole of a certain plot, and that he did not procure such purchaser, but did procure one for a portion of the plot, a judgment for the plaintiff should be reversed and the complaint dismissed.⁵

At page 144, at end of § 133, add:

An agent to sell real estate cannot bind his principal "by a contract requiring him to carry out or perform its terms elsewhere than at his own home or place of business, even though it may be in a distant state. And although the contract is clearly within the agent's authority as to price and time of payment, yet if the agent assumes authority to insist on provisions not contemplated by the agreement of agency—as, for example, that the seller shall send his deed to a certain bank for delivery or that the purchase money shall be paid at some named bank, or office, in the vicinity of the land, or the place where the contract is made, or elsewhere than at the seller's place of residence or business, or that payment be conditioned upon the seller's delivery of an abstract of title which shall be found sufficient by some third person—such added provision vitiates the entire contract and, unless ratified or approved, the agent cannot recover commissions upon any sale so made or attempted."⁶

§ 134. Acceptance by Owner of Different Terms (p. 144)

Add to footnote 15:

Futrell v. Reeves, 165 Ky. 282; 176 S. W. 1151 (1915).

§ 135. Broker's Commission, if He is "Procuring Cause," Not Affected by Variation of Terms (p. 145)

Add to footnote 18:

Lerner v. Harvey, 155 N. W. (Mich.) 427 (1915); Doub & Co. v. Taylor, 150 Pac. 687 (1915).

§ 136. Requirements as to Price (p. 145)

An agent to sell has no authority to sell on a credit unless specially authorized to do so by his principal.⁷

On page 146 after "for all cash,"²⁴ add:

And so it has been said that where a broker has no authority to sell, except for cash, a sale for a small payment of cash in

⁵Martin v. Crumb, 158 App. Div. 228; 142 N. Y. Suppl. 1096 (1913).

⁶Anderson v. Howard, 155 N. W. (Iowa) 261 (1915).

⁷McKay v. McKinnon, 58 Tex. Civ. App. 1; 122 S. W. 440 (1909).

hand, balance when deed and satisfactory abstract should be delivered, is not a cash sale.⁸ Of course, if such terms of payment are proposed, and are accepted by the principal, that presents an entirely different question.

Add to footnote 24:

Anderson v. Howard, 155 N. W. (Iowa) 261 (1915).

§ 139. Liability of Broker for Failure to Sell (p. 148)

Add to footnote 39:

Lord v. Wapato Irr. Co., 142 Pac. 1172 (1914).

⁸Anderson v. Howard, 155 N. W. (Iowa) 261 (1915).

CHAPTER XIII

BROKER MUST ACT IN GOOD FAITH

§ 141. Good Faith (p. 150)

"It is an elementary principle that an agent cannot take upon himself incompatible duties, and characters, or act in a transaction where he has an adverse interest or employment. . . . In such a case he must necessarily be unfaithful to one or the other, as the duties which he owes to his respective principals are conflicting, and incapable of faithful performance by the same person."¹

"Where fraud is claimed by which a person is induced to enter into a contract with brokers or others, and such fraud is relied upon as a defense in an action upon the contract it should be pleaded as an affirmative defense. In an action upon any contract, however, evidence to show that the person bringing the action has failed to perform his contract in whole or in part is competent under a general denial. It is not necessary in pleading to allege specifically facts to show the failure of the person bringing the action to carry out the contract upon which the action is brought. Proof of bad faith in carrying out the agreement sued upon or failure in any way honestly, fairly and in good faith to carry out the contract upon which the action is brought can be asserted and shown under a general denial."²

Add to footnote 1:

Garrigues Co. v. International Agri. Corp., 159 App. Div. 877; 144 N. Y. Suppl. 982 (1913).

Add to footnote 4 (p. 151):

Cardozo v. Middle Atl. I. Co., (Va. App.) 82 S. E. 80 (1914).

§ 142. Accepting Pay from or Acting for Other Party to the Transaction (p. 151)

That it is not always an easy task to say when the broker is acting in good faith and when he is not, must be evident. In one case,³ a real estate broker had made a contract whereby he agreed

¹Murphy v. Harrison Granite Co., 168 App. Div. 723, 730; 154 N. Y. Suppl. 546 (1915).

²Dickinson v. Tysen, 209 N. Y. 395 (1913).

³Foss v. N. Y. C. & H. R. R. Co., 161 App. Div. 681; 146 N. Y. Suppl. 930 (1914); affd., 217 N. Y. 727 (1916), no opinion.

to conceal his principal, a railroad company, in the purchase of certain lands, and to endeavor to obtain the lowest price and to look only to the seller for his commissions. The question of good faith did not arise through any objection of the seller who was to pay the commission, but after the railroad company had purchased some of the parcels through the broker under this arrangement, it subsequently purchased other parcels in the tract directly from the owners and the broker sued the company for an alleged breach of the agreement, and the question of good faith was then urged by the railroad company.

While in this case the broker was denied a recovery on grounds other than the question of good faith, that question was discussed. One of the justices said: "I see no objection to a broker, representing one desirous of purchasing property, going to the owner and saying: 'I know some one who may purchase your property if you will offer it at a reasonable figure, and I am representing him, but I shall not proceed with the negotiations unless you agree to pay for my services, which are to be rendered to the purchaser from whom I am to receive no compensation.' . . . There was no agreement on the part of the plaintiff (the broker) to do anything for the owners, and he was not vested by them with any discretion. They fixed their selling prices and made their own propositions to him to be presented to his client."

Another justice of the court took a somewhat different view, however, saying: "I concur in the reversal of this judgment and dismissal of the complaint on the ground stated by my brother Laughlin, but I do not concur with him in his conclusion that a broker engaged in a negotiation for the sale of real property can receive a commission from the seller and at the same time contract with the purchaser to receive an advantage from him without disclosing such contract to the seller. A broker approaching the owner of real estate with an offer to purchase the property and making an agreement with the owner of the property that he shall receive a commission from the owner for his services in selling the property assumes towards the seller a position in which the utmost good faith is required on his part. The very fact that he undertakes to act in that capacity imposes this obligation upon him and whether he gives up the name of the customer or not, if he is to receive his commission from the seller he cannot place himself in a position antagonistic to the seller's interest and procure any advantage from the purchaser without disclosing the true condition of the seller.

"The plaintiff here assumed from the beginning of the negotiation that he was to get his commission from the seller. The fact that he represented the purchaser in his endeavors to procure the property at as small a price as possible justified him in going to the owners of the property and making an offer and endeavoring to get the property at as low a price as possible, and if he had acted openly with the owners and stated that he represented the purchaser there would have been no objection to the transaction. But that he never did. He went to the owners of the property with the offer and demanded a commission if he carried out the transaction. To that the owners agreed. He thereby became bound to state to the owners who were to pay him for his services that he rendered, his relation to the persons who had made the offer and that he was acting for them in procuring the property at as small a price as possible and could not be depended on to represent the owners in the transaction, and to show the utmost good faith. And it seems to me that if he had completed the sale the owners could have refused to pay him any commission upon the ground that, having brought an offer to them and asked them for a commission for services that he rendered to them in making a sale, he was all that time acting against their interests and was endeavoring not to induce the purchaser to pay more, but to induce the seller to take less. This seems to me to be a distinct violation of his duty to the sellers as laid down in *Dickinson v. Tyson*."⁴

In *Dickinson v. Tyson*,⁵ it was said: "It may be conceded that where a broker with full knowledge of the person whom he represents, carries an offer to an owner of real property and makes the same contingent upon the owner paying to the person communicating the offer, a specified commission, that there is no obligation on the part of the person communicating the offer to disclose to the owner any facts within his knowledge as to the intention or ability of the proposed purchaser to sell the property to another at an advanced price. In such case it rests with the owner to accept the offer or reject it as he chooses, and if he accepts it he must do so subject to the condition that commissions be paid as stated.

"A wholly different situation exists when brokers are employed by the owner to procure a purchaser for his real property. After such an agreement brokers act by the authority and in the interest of the owner, and it is their duty to act fairly, honestly, and in good faith towards such owner. In that case their skill, knowl-

⁴ 209 N. Y. 395 (1913).

⁵ *Id.*

edge and experience must be used to benefit the owner and cannot be withheld, particularly to further some personal interest of the brokers."

§ 145. When Refusal to Disclose Information is Not Bad Faith (p. 154)

✓ It is the duty of a broker to impart to his principal any information which comes under his observation that would in any way affect his principal's business, so that his principal may determine whether the deal should be consummated or not.⁶

⁶Greenblatt v. Fox, 59 Pa. Super. Co. 53 (1915).

CHAPTER XIV

AVAILABILITY OF PURCHASER

§ 147. Ready and Willing to Purchase (p. 155)

Although the ready, willing, and able rule is concurred in, courts in effect are sometimes led almost by the contrary rule, because of their interpretation as to what amounts to a "ready, willing and able" purchaser. For example, in *Mott v. Minor*,¹ it was said: "In *Gunn v. Bank of California*,² it is said: 'It is, of course, well settled that when a broker employed simply to negotiate a sale of real estate has found a purchaser able, ready and willing to purchase upon the vendor's terms, his right to the agreed commission is complete, and does not depend upon the final acceptance by the purchaser of a conveyance of the property sold. . . . But the question here is: What is finding or procuring a purchaser within the meaning of the rule of law declared in this and the other cases cited? Is it sufficient for a broker to merely find a person financially able, and who verbally agrees with him to purchase upon the terms of the vendor and makes a deposit, but who neither signs a binding agreement to purchase upon such terms nor is produced before the vendor as a person ready and willing to enter into such a contract? It seems to us very clear that this question must be answered in the negative. The contract of the broker is to negotiate a sale; that is, to procure a valid contract to purchase, which can be enforced by the vendor if his title is perfect; or if he does not procure such contract, to bring the vendor and the proposed purchaser together, that the vendor may secure such a contract, unless he is willing to trust to an oral agreement.' The case of *Hayden v. Grillo*,³ is quoted to the same effect, wherein it is said: 'But the necessity of a written contract of sale may be rendered unnecessary if the agent bring the vendor and vendee together, and the latter is able and willing and offers to complete the contract provided the vendor will make the conveyance.' The same doctrine is declared in *Mattingly v. Pennie*,⁴ and it is held that: 'The readiness and willingness of a person to pur-

¹(Cal. App.) 106 Pac. 244 (1909).

²99 Cal. 352; 33 Pac. 1106.

³35 Mo. App. 647.

⁴105 Cal. 519; 39 Pac. 202; 45 Am. St. Rep. 87.

chase the property can be shown only by an offer on his part to purchase; and unless he has actually entered into a contract binding him to purchase or has offered to the vendor and not merely to the broker to enter into such a contract he cannot be considered a purchaser.'"

§ 148. Purchaser Not Ready and Willing (p. 156)

The proposed purchaser must be willing to purchase, and therefore the vendor, in resisting the broker's claim for commissions, may show that the proposed purchaser was not willing to purchase but told the vendor to let another proposed purchaser have the property.⁵

§ 149. Procuring Person Who Takes Option (p. 158)

A broker employed under the ordinary employment to find a purchaser, or to sell property is not entitled to compensation for procuring merely a customer to take an option, which has never been exercised.⁶

It has been suggested that while the mere procuring of one to take an option does not entitle the broker to commissions if the optionee elects not to exercise the same, yet the broker is entitled to his commission if the option is actually exercised, or the optionee is willing to exercise it, but is prevented from so doing by the refusal of the owner to comply with his part of the agreement.⁷

There can be no doubt of the correctness of such proposition, for in such case the negotiation passes beyond the option stage and the broker has, in fact, produced a purchaser ready, willing, and able to purchase on the employer's terms.

Add to footnote 12:

Duncan v. Parker, 142 Pac. (Wash.) 657 (1914).

Add to footnote 16 (p. 159):

Worthington v. McGarry, 149 Ala. 251; 42 So. 988 (1907).

§150. Change of Mind by Vendor (p. 159)

When the broker has procured a willing and able purchaser, who assents to all the terms which the vendor has prescribed to the broker, the broker cannot be deprived of his commission by the vendor's capricious or obstinate insistence upon additional

⁵McNamara v. Gregory, 211 N. Y. 21; 105 N. E. 78 (1914).

⁶Warnekros v. Bowman, 128 Pac. (Ariz.) 49; 43 L. R. A. (N.S.) 91 (1912). In the note to this case in 43 L. R. A. (N. S.) 91, many authorities are cited.

⁷Note to Warnekros v. Bowman, in 43 L. R. A. (N. S.) 91 (1912).

and unreasonable provisions to be inserted in the contract of purchase. "In such a case, the broker has done all that the vendor employed him to do and all that he undertook to do. The sale is defeated not by reason of any lack of ability or willingness on the part of the intending purchaser, or any refusal on his part to comply with the terms prescribed by the vendor to the broker, and by him disclosed to the buyer, but on account of the unreasonable imposition of new terms by the vendor. The broker's claim to compensation cannot thus be nullified."⁸

§ 151. Disclosure of Purchaser (p. 159)

Add to footnote 22 (p. 160):

See § 130.

Add to footnote 23 (p. 160):

See §§ 96, 127a.

§ 153. Financial Ability of Purchaser (p. 161)

Where the sale falls through because of the refusal of the vendor to accept the proposed purchaser, the broker, in order to recover commissions, must still show that he produced a purchaser ready, willing, and able to purchase.⁹

§ 154. When Financial Ability of Purchaser Need Not be Shown (p. 162)

"When an agent brings to a principal a purchaser for his property, and the principal enters into a contract of his own making with the purchaser so furnished, then the rule is that such principal has accepted the purchaser so found by the agent, and the agent's commission is then due, although it may afterward turn out that the customer was not financially able to buy."¹⁰

"The ground on which this is settled is that by entering into a valid contract with the customer produced by the broker the principal accepts the customer as able, ready and willing to buy the land and pay for it."¹¹

The general rule prevailing in regard to the broker's right to

⁸Davidson v. Stocky, 202 N. Y. 423; 95 N. E. 753 (1911).

⁹Mott v. Minor (Cal. App.), 106 Pac. 244 (1909).

¹⁰Knisely v. Leathe, 178 S. W. (Mo.) 453 (1915); Coleman v. Meade, 13 Bush. (Ky.) 358; Donohue v. Flanagan, 9 N. Y. Suppl. 273; Roche v. Smith, 176 Mass. 597; 58 N. E. 153; 51 L. R. A. 510; 79 Am. St. Rep. 345; Francis v. Baker, 45 Minn. 83; 47 N. W. 452; Wray v. Carpenter, 16 Colo. 271; 27 Pac. 248; 25 Am. St. Rep. 265; Lockwood v. Halsey, 41 Kan. 166; 21 Pac. 98; Springer v. Orr, 82 Ill. App. 558; Love v. Miller, 53 Ind. 294; 21 Am. Rep. 192; cf. Riggs v. Turnbull, 105 Md. 135.

¹¹Roche v. Smith, 176 Mass. loc. cit. 597; 58 N. E. 153; 51 L. R. A. 510; 79 Am. St. Rep. 345.

commissions where the purchaser procured by him is financially unable to perform his contract, is that the owner of real estate who employs a broker to negotiate the sale of his land cannot escape paying the broker's commission on the ground that the customer produced by the broker was not able to pay for the land, where he had accepted the purchaser as satisfactory and conveyed the premises to him. The broker undertakes to bring the minds of the seller and buyer together in an agreement to sell and purchase, wherein the price and terms should be satisfactory to both, and there can be no more conclusive evidence that he has done this, than the execution and delivery of the deed to the land by the seller to the purchaser.¹²

"Following this doctrine, it has been held that the broker, under a general contract of employment for the sale of real estate, is entitled to his commission where he produces a purchaser satisfactory to his principal, and with whom the principal makes an enforceable contract of purchase and sale without being induced so to do by any representation of the broker as to the ability of the proposed purchaser to perform the contract, and without any bad faith on the part of the broker, although, without any fault of the principal, the vendor afterward fails to perform the contract, solely because of the lack of sufficient financial responsibility at the time of the making of the contract."¹³

An early case in Kansas¹⁴ to the contrary effect, was disapproved when the case was again before the court.¹⁵

The doctrine above stated does not apply where the broker as a part of his employment assumes to execute for his principal an executory contract of sale. Under such circumstances, he is not entitled to his commission unless the other contracting party is able to perform the contract on his part.¹⁶

This is, obviously, on the theory that where the principal himself enters into and executes the contract, he has thereby made his choice of personally accepting the purchaser and has thus himself

¹²Van Varick v. Suburban Inv. Co., 76 Misc. 593; 135 N. Y. Suppl. 299 (1912); Travis v. Graham, 23 App. Div. 214; 48 N. Y. Suppl. 736.

¹³Van Varick v. Suburban Inv. Co., 76 Misc. 593; 135 N. Y. Suppl. 299 (1912); Alt v. Doscher, 102 App. Div. 344; 92 N. Y. Suppl. 439; aff'd., on opinion of the lower court in 186 N. Y. 566; 79 N. E. 1100; Brady v. Foster, 72 App. Div. 416; 75 N. Y. Suppl. 994; Heinrich v. Korn, 4 Daly 74; Wray v. Carpenter, 16 Colo. 271; 27 Pac. 248; 25 Am. St. Rep. 265; Shainwald v. Cady, 92 Cal. 83; 28 Pac. 101; Parker v. Estabrook, 68 N. H. 349; 44 Atl. 484; Hancock v. Dodge, 85 Miss. 228; 37 So. 711; Morgan v. Keller, 194 Mo. 663, 680; 92 S. W. 75; Crane v. Eddy, 191 Ill. 645; 61 N. E. 431; 85 Am. St. Rep. 284; Bankers Loan Investment Co. v. Spindle, 108 Va. 425; 62 S. E. 266; Green v. Hollingshead, 40 Ill. App. 195.

¹⁴Stewart v. Fowler, 37 Kan. 677; 15 Pac. 918.

¹⁵Id. 53 Kan. 537; 36 Pac. 1002.

¹⁶Van Varick v. Suburban Investment Co., 76 Misc. 593; 135 N. Y. Suppl. 299 (1912); Inge v. McCreery, 60 App. Div. 557; 69 N. Y. Suppl. 1052.

passed upon the financial responsibility and the acceptability of the purchaser, whereas when the broker has entered into and executed the contract on behalf of his principal, the broker assumes to take the responsibility of the financial ability and other ability of the purchaser to carry out the contract.

Add to footnote 37 (p. 163):

Bailey v. Padgett, 70 So. (Ala.) 637 (1915).

§ 155. Burden of Proof as to Financial Ability of Purchaser (p. 164)

It is intimated that testimony as to the purchaser's reputation for financial ability is competent,¹⁷ as also testimony as to the character and magnitude of the financial institutions with which the purchaser is connected.¹⁷ And so it is said that slight evidence of the financial ability of the proposed purchaser is sufficient, and that this would be especially true where the vendor has not based his failure to complete upon the purchaser's inability to pay.¹⁸

¹⁷Hutchinson v. Plant, 218 Mass. 148; 105 N. E. 1017 (1914).

¹⁸See Bailey v. Padgett, 70 So. (Ala.) 637 (1915).

CHAPTER XV

TRANSACTION MUST BE COMPLETE

§ 157. What Constitutes a Completed Transaction (p. 166)

Add to footnote 1:

Chenkin v. Lipman, 138 App. Div. 267; 122 N. Y. Suppl. 1083 (1910).

§ 158. General Rule as to Completeness of Transaction (p. 167)

Add to footnote 4:

Backer v. Ratkowsky, 137 App. Div. 564; 122 N. Y. Suppl. 225 (1910). See also § 167.

§ 163. Options and "Alternative" Contracts (p. 171)

A broker who produces a written contract of a proposed purchaser is not entitled to commissions if such proposed contract, although embodying all the terms of the vendor, also contains a clause that if the buyer fails or refuses to perform his part of the contract of purchase, the deposit of \$100 shall be forfeited as liquidated damages, and the vendor refuses to accept such contract. The proposed written contract, being in such case the only offer of the purchaser, does not meet the vendor's terms, inasmuch as it imposes a new term, i. e., the forfeit of \$100 as liquidated damages.¹

Add to footnote 30 (p. 172) before "But see":

Anderson v. Jackson, (Tex. Civ. App.) 168 S. W. 54 (1914).

¹Cavanaugh v. Conway, 36 R. I. 571; 90 Atl. 1080 (1914).

CHAPTER XVI

FAILURE OF PRINCIPAL TO COMPLETE

§ 167. General Rule as to Failure of Principal to Complete (p. 176)

✓ The principal may not defeat the broker's right to an earned commission by capricious refusal to accept the purchase.¹

The broker having produced a purchaser willing and able to accept the terms of the principal, has earned his commission, and the refusal of the vendor to complete the bargain cannot destroy the broker's right to the commission.² Nor may the owner defeat the broker's earned commission by mutually rescinding the contract of purchase with the purchaser.³

It has been said that though the vendor expressed himself as satisfied with the proposition made by the customer produced by the broker, such expression of satisfaction could not fairly be said to be such an acceptance of the proposed customer as bound the vendor to make the contract of sale, or rendered him liable to pay the broker's commission for such transaction, if for any reason the subsequent negotiations fell through and no contract was made.⁴

Add to footnote 3:

Tanenbaum v. Boehm, 202 N. Y. 293; 95 N. E. 708 (1911); Tull v. Starmer, 188 Mo. App. 713; 176 S. W. 511 (1915). See §§ 158, 177, 187, 191.

Add to footnote 9:

As to broker's right to recover from vendor commissions promised by purchaser, when vendor refuses to convey, see cases under § 334.

Add to footnote 7 (p. 177):

See also § 116, footnote 14.

§ 168. Defective Title as Cause of Failure (p. 177)

✓ "If from a defect in the title of the vendor a sale falls through, nevertheless the broker is entitled to his commission for the simple

¹Handley v. Shaffer, 177 Ala. 636; 59 So. 286; Bailey v. Padgett, 70 So. (Ala.) 637 (1915).

²Beougher v. Clark, 81 Kan. 250; 106 Pac. 39 (1910).

³Harrington Co. v. Rose Conser., 222 Mass. 372; 111 N. E. 37 (1916). See also § 172.

⁴Backer v. Ratkowsky, 137 App. Div. 565; 122 N. Y. Suppl. 225 (1910).

reason that he has performed his contract. The contract between the parties must be fairly and justly construed."⁵

Add to footnote 11:

O'Reilly v. Cryer, (Tex. Civ. App.) 175 S. W. 773 (1915).

Add to footnote 12:

But where the seller's broker knew that the title was defective and the seller had agreed with the broker to cure the defect before contract, the broker would not lose his commission upon producing a purchaser, who refused to take the defective title which the seller had omitted to cure. McGowan v. Eubank, (Tex. Civ. App.) 177 S. W. 512 (1915).

On page 178, after "consummated the sale" add:

Reeder v. Epps, 166 S. W. (Ark.) 747 (1914).

§ 170. Special Causes of Failure (p. 179)

All the terms of a trade having been agreed upon, the vendor cannot escape payment of commissions by asserting, as an excuse for his failure to consummate the trade, that the terms of a mortgage which he was to take in part payment of the price, had not all been agreed upon.⁶

"When a party gives a reason for his conduct and decision touching anything involved in the controversy, he is estopped, after litigation is begun, from changing his ground, and putting his conduct on another and different consideration."⁷

⁵Tyler v. Seiler, 76 Misc. 185; 136 N. Y. Suppl. 394 (1912).

⁶Sheridan v. McLaughlin, 172 App. Div. 314; 158 N. Y. Suppl. 406 (1916). See also § 159.

⁷Snyder v. Supreme Ruler, etc., 122 Tenn. 248; 122 S. W. 981 (1909).

CHAPTER XVII

FAILURE OF CUSTOMER TO COMPLETE

§ 172. General Rule as to Failure of Customer (p. 181)

It is even intimated that where a purchaser refuses to complete his contract, and the vendor does not compel the performance of the contract, the broker can sue the purchaser to compel performance, on the theory that an agent having an interest in the contract such as his commissions, can sue to compel performance.¹

Add to footnote 2 (p. 182):

Croak v. Trentman, 150 Pac. (Okla.) 1088 (1915).

“When a broker, as a part of his employment, assumes to execute for his principal an executory contract of sale or exchange he does not become entitled to his commissions unless the other contracting party is able to perform the contract on his part.”²

Add to footnote 3:

Bird v. Rowell, 180 Mo. App. 421; 167 S. W. 1172.

§ 173. Abandonment of Broker by Customer (p. 182)

Add to footnote 6:

Lord v. U. S. Transportation Co., 143 App. Div. 437, 456; 128 N. Y. Suppl. 451 (1911).

§ 174. Misrepresentations by Vendor (p. 183)

Where in an action by real estate brokers to recover commissions under an employment to procure a purchaser for the defendant's building, the defendant furnished to the plaintiffs a statement as to the number of apartments in the building to be sold and the sum for which they were separately rented, to be used in procuring a purchaser; and the plaintiffs procured persons to sign a contract to purchase in reliance upon such statement, and they refused to complete the purchase because of misrepresentations in the statement, a judgment for the plaintiffs should be affirmed.³

It is the broker's “duty to inquire as to terms of sale and as to matters affecting the general character of the property. There is

¹Cordozo v. Middle Atl. I. Co., (Va. App.) 80 S. E. 80 (1914).

²Kalley v. Baker, 132 N. Y. 1; 29 N. E. 1091; 28 Am. St. Rep. 542 (1892). See also Van Varick v. Suburban Invest. Co., 76 Misc. 593; 135 N. Y. Suppl. 299 (1912).

³Schweid v. Storandt, 157 App. Div. 855; 143 N. Y. Suppl. 161 (1913).

no duty on the part of a real estate owner to inform a broker of encroachments unless he is asked about them. It is not misrepresentation, either wilful or inadvertent, for him to remain mute, when he is not asked, and when he is under no duty to volunteer or speak."⁴

Add to footnote 7:

Hutchinson v. Plant, 218 Mass. 148; 105 N. E. 1017 (1914).

⁴Wiggins v. Estate of Coddington, 83 Misc. 439, 441; 145 N. Y. Suppl. 3 (1913).

CHAPTER XVIII

COMMISSIONS ON EXCHANGES OF PROPERTY

§ 177. Commissions on Exchanges (p. 186)

It is said that in the case of an exchange, the right of the broker to commissions depends upon showing that the parties actually reached an agreement as to all the details of the proposed exchange, or that he produced a party who was able, ready, and willing to exchange on terms which the employer had stated to the broker would be satisfactory.¹

"To entitle a broker to compensation upon a proposed exchange of property, he must show that, after the terms of the exchange had been agreed upon, the client refused to carry them out. This does not mean that the client, having agreed upon some of the terms discussed, may not change his position regarding some element discussed during the conference, or introduce other terms essential to the making of a final contract at the risk of paying a broker's commission."²

Add to footnote 6:

Brilliant v. Samelas, 221 Mass. 302; 108 N. E. 1047 (1915).

✓ § 179. Authority to Sell Does Not Give Authority to Exchange (p. 187)

"A power to sell or to convey would not carry with it a power to exchange. Where powers are granted by a principal to an agent in a general language, it is the rule that such powers may be implied as are indispensable to the exercise of the grant of general powers. But this rule does not go to the extent of an implication of a power which may be, in a given case, convenient though not indispensable."³

✓ § 181. Rule When Contract Has Been Executed (p. 187)

Where the broker has procured an enforceable contract of exchange to be made, it is immaterial that the contract was never performed

¹*Davis v. Gottschalk*, 80 Misc. 530, 531; 141 N. Y. Suppl. 517 (1913).

²*Id.*, 80 Misc. 530, 533; 141 N. Y. Suppl. 517. See also §§ 158, 167.

³*Forman v. Berry*, 163 App. Div. 594; 148 N. Y. Suppl. 959 (1914).

or that one of the parties was not in a position to perform it.⁴

Where in an action by a real estate broker to recover commissions for procuring an exchange of lands it appears that the plaintiff procured a party with whom the defendant entered into a contract, it is error to dismiss the complaint on the merits upon the theory that the plaintiff had failed to establish that the party with whom the defendant contracted was the attorney in fact of the owner of the land he contracted to exchange as he had represented himself to be when he signed the contract. The defendant, having decided to enter into a contract with knowledge that the other party claimed to be only the attorney in fact of the owner, thereby relieved the plaintiff from responsibility in that respect.⁵

By an agreement between a broker and the owner of real property that the broker shall have a commission of \$350 for effecting an exchange of properties, but that, if the owner of the other property refuses to take title and pay the consideration, the total commission is to be \$100 only, a refusal to take title pursuant to the terms of the contract for the exchange of the properties is intended and not a refusal because the owner making the agreement is unable to carry out the contract.⁶

§ 182. Reason for Rule (p. 189)

In *Backer v. Ratkowsky*,⁷ it was said: "A person is not bound to enter into a contract which the other party to the contract is not then able to perform merely because the other party expects to be able or is willing to obligate himself to perform. It seems to me there must be presented to entitle a broker to commissions a customer who is capable of carrying out the contract at the time that it is proposed that one be executed."

§ 183. Rule as Affected by Broker's Bad Faith (p. 191)

Where the broker knows that one of the contracting parties is without title, and conceals that fact from his employer, he cannot recover commissions although a contract for the exchange of properties was actually entered into, where it was not carried out because the other party to the exchange contract with the broker's employer, had no title.⁸

⁴*Slocum v. Ostrander*, 141 App. Div. 380; 126 N. Y. Suppl. 219 (1910); *affd.*, 205 N. Y. 617; citing *Alt v. Doscher*, 102 App. Div. 344; 92 N. Y. Suppl. 439; *affd.*, 186 N. Y. 566; 79 N. E. 1100; *Kalley v. Baker*, 132 N. Y. 1; 29 N. E. 1091; 28 Am. St. Rep. 542 (1892). See also *Brilliant v. Samelas*, 221 Mass. 302; 108 N. E. 1047 (1915).

⁵*Callister v. Wichern*, 147 App. Div. 14; 131 N. Y. Suppl. 611 (1911).

⁶*Freilich v. Tucker*, 68 Misc. 318; 123 N. Y. Suppl. 786 (1910).

⁷137 App. Div. 564; 122 N. Y. Suppl. 225 (1910).

⁸*Wiley v. Kraslov Construction Co.*, 141 App. Div. 706; 126 N. Y. Suppl. 879 (1910).

CHAPTER XIX

COMMISSIONS ON LOANS

§ 186. New York Rule (p. 194)

"It has been settled by repeated decisions of this court that where a broker is employed to find a purchaser for real estate, and procures one ready, able and willing to pay, he is entitled to his commissions although the sale is prevented by defects in the vendor's title. In the last case cited,¹ Judge Earl stated the law as follows: 'Where the contract of sale is executed between the employer and the purchaser, the right of the broker to his commissions does not depend upon the performance of the contract by the purchaser. If from a defect in the title of the vendor, or from a refusal to consummate the contract on the part of the purchaser for any reason in no way attributable to the broker, the sale falls through, nevertheless the broker is entitled to his commissions, for the simple reason that he has performed his contract.'

"We perceive no distinction in principle between such a case and one where a broker agrees to procure a loan and completes on his part, but the loan is never consummated because the intending borrower cannot furnish the agreed security. In both cases the broker has done all that he could. He has rendered the stipulated service and it is through no fault of his that the matter is never completed. In both cases the efforts of the broker are rendered futile by the fault or misfortune of the employer, and under such circumstances the employer ought not to be heard to say that the broker has not performed. It is a familiar principle that one cannot avail himself of the failure to observe a condition precedent who has himself occasioned its non-performance; and it has been applied by the English courts to several cases where it was held that the broker, under circumstances not essentially different from those at bar, was entitled to his commissions.² This view accords with the decisions in this state upon the subject."³

While it has been said that "the physical production of a lender is not necessary if, as a matter of fact, there is a lender able and

¹*Gilder v. Davis*, 137 N. Y. 504.

²*Green v. Lucas*, 33 Law Times R. (N. S.) 584; *Fisher v. Drewett*, 39 Law Times R. 253.

³*Smith v. Peyrot*, 201 N. Y. 210, 214; 94 N. E. 662 (1911).

willing to loan,"⁴ it has also been said that "procuring an agreement from a third person to make a loan is not the same thing as procuring a loan."⁵

It has also been said that the burden is upon the broker of showing that he had procured a customer ready, able, and willing to make the loan on the terms upon which he was authorized to procure it, so that if the principal had not refused to proceed, he would have received the loan of money as desired unconditionally then and there, if, indeed, an actual tender and rejection of the loan is not essential.⁶

Where no time is fixed within which the broker is to procure a loan, a reasonable time is implied.⁷

Where a broker employed to procure a loan on or before a certain date does not establish that he procured the loan, or was prevented by his employer from so doing, before the expiration of the time limit, he is not entitled to recover his commission; that on the last day he had procured an agreement with a third person to make the loan is insufficient.⁸ It would appear that the money must be actually advanced by the lender within the stipulated time.⁹

Where brokers, employed to procure from a title company its acceptance of an assignment of a first mortgage as security for a loan, secure merely an acceptance subject to the requirements and regulations of the title company, they are not entitled to commissions.¹⁰

In *Holman v. Patten*,¹¹ the broker sued the owner for commissions for procuring the loan, claiming that the loan was not made because of the fault of the owner. The loan agreement provided that the borrower, the owner, was to furnish a policy of title insurance from one of two named title insurance companies, showing that the owner's title was a marketable one. The title company gave as an objection to the title that there was an outstanding interest in land "lying east of the original high water mark of the Harlem River." It did not refuse to issue a policy but was willing to do so with that exception, which was held to be frivolous. It was held that the borrower was not at fault, but that the broker failed to make out a case in that the person he produced refused to make the loan although the title was good. The broker made no attempt to establish

⁴*Van Orden v. Simpson*, 90 Misc. 322, 323; 153 N. Y. Suppl. 134 (1915).

⁵*Slawson & Hobbs v. Rafter*, 76 Misc. 199; 134 N. Y. Suppl. 585 (1912).

⁶*Von Bayer v. Ninigret Mills Co.*, 164 App. Div. 698, 703; 150 N. Y. Suppl. 291 (1914).

⁷*Sugarman v. Fraser*, 71 Misc. 416; 128 N. Y. Suppl. 718 (1911).

⁸*Slawson & Hobbs v. Rafter*, 76 Misc. 199; 134 N. Y. Suppl. 585 (1912).

⁹*Id.*

¹⁰*Sugarman v. Kearns*, 84 Misc. 450; 146 N. Y. Suppl. 192 (1914).

¹¹170 App. Div. 877; 156 N. Y. Suppl. 613 (1915).

that any part of the land lay east of the original line of the high water mark, although that was the only objection contained in the report of the title company which was considered of any consequence.¹²

§ 188. The Rule in Some of the Other States (p. 196)

In the fourth line, after the words "upon the terms proposed" add footnote 11a as follows:

Hughes v. Chung Sun Tung Co., 28 Cal. App. 371; 154 Pac. 299 (1915);
Maxon v. Jones, 128 Cal. 77; 60 Pac. 516.

If one is employed by another to find a third party who will make a certain loan to him, and such employee finds a third party able, willing, and ready to make the loan, he may recover the compensation agreed upon for the service.¹³

§ 191. Failure to Complete on Account of Defects, etc. (p. 200)

Where a person makes an agreement with a broker to procure a loan for the former, for which he is to pay the broker, and the broker, acting in behalf of such person, applies to a title company for the loan, and obtains its acceptance by the company, such person for whom the broker acted becomes responsible to the company for its charges.¹⁴

An agreement by a husband to give a mortgage is not binding on his wife, and does not affect her dower right, if she does not join in the agreement.¹⁵

§ 195. Amount of Commissions on Loan (p. 204)

The arrangement most advantageous to the broker or attorney representing the lender, is the one now insisted upon by the various title and guarantee companies; namely, the borrower must sign a written memorandum that he agrees to pay a fixed amount for procuring the loan, for examining and guaranteeing or securing the guarantee of the title to the property, to the lender, drawing and

¹²It does not appear whether the title company was the proposed lender. Therefore it is difficult to say whether the court meant to hold that as the title company was the proposed lender it was wrong in refusing to loan because of the alleged defect, or whether it was intended to hold, a third party being the lender, that notwithstanding the exception stated by the title company, the borrower had really furnished a policy showing that the title was marketable.

¹³Bartlett v. Garrett, 188 Mo. App. 144; 175 S. W. 79 (1915).

¹⁴Title Guarantee & Trust Co. v. Carroll, 145 App. Div. 926; 129 N. Y. Suppl. 919 (1911). See also § 203.

¹⁵Meixel v. Meixel, 161 App. Div. 518; 146 N. Y. Suppl. 587 (1914). See also § 116.

recording papers, etc., and that this amount should be paid whether the loan is actually made or not.¹⁶

Statutes of some states restrict the exactions of sums in connection with the loan of money, for commissions, examinations, renewals, etc., when the security offered is a chattel mortgage. A discussion of that subject is, however, outside of the scope of a work relating to real estate brokers.

A statute which forbids any person to charge more than a specified percentage of brokerage for procuring a loan, but does not prescribe any penalty for its violation, does not render void a contract for a greater brokerage, but the broker can recover only the statutory amount.¹⁷

Such statutes are not always limited to brokers engaged in the occupation of soliciting and procuring loans, but apply to the character of the services rendered. In other words, the statutes do not apply to persons but to anyone performing brokerage services of the kind mentioned.¹⁸

¹⁶See Form 40a *post*.

¹⁷*Buchanan v. Tilden*, 18 App. Div. 123; 45 N. Y. Supl. 417 (1897).

¹⁸*Id.* Cf. § 11.

CHAPTER XX

COMMISSIONS ON LEASES

§ 197. When Broker's Obligations Are Performed (p. 205)

The doctrine of the cases relating to sales of real estate is equally applicable to those of leases of real estate.¹

A real estate broker may recover commissions upon the rental reserved in a lease procured by him although the lease has not been actually executed by the parties, if they have made a valid and binding agreement to make it.²

Where there has been such an agreement between the proposed tenant and the broker's employers upon the essentials of a contract of lease as to have rendered it enforceable by an action, the broker has earned his commissions, and the requirement of the Statute of Frauds that the agreement must be evidenced in writing, which might be pleaded as a defense, has no bearing upon the question of whether the broker had earned his commission. That, alone, depended upon whether the minds of the parties had met upon an agreement for a lease, and whether the broker had been the procuring cause.³

Where the minds of the parties had, in fact, met in agreement upon the essential terms and conditions of a lease, and the subsequent failure to consummate it formally is due to an unreasonable demand of the landlord, the broker cannot be deprived of the right to his commissions.⁴

§ 198. General Requirements for Recovery of Commissions (p. 206)

A real estate broker becomes entitled to a commission only when he is the procuring cause of the lease which he has been engaged to negotiate.⁵

Where the property is placed in the hands of several brokers for the purpose of securing a tenant, the owner is ordinarily obligated

¹Tanenbaum v. Boehm, 202 N. Y. 293; 95 N. E. 708 (1911). See also § 231.

²Guarantor Realty Corporation v. Barnum, 172 App. Div. 9; 157 N. Y. Suppl. 911 (1916).

³Tanenbaum v. Boehm, *supra*.

⁴Tanenbaum v. Boehm, *supra*.

⁵Fox v. Cammeyer, 93 Misc. 180; 156 N. Y. Suppl. 1046 (1916).

to pay commissions only to the one who was the procuring cause of the lease.⁶

Where, in an action by a broker to recover commissions for procuring a lease of real estate, it appears that the plaintiff only called the attention of an agent of a proposed lessee to the premises and submitted an offer to make a lease which was rejected, and submitted another offer made by defendants, which was never accepted, and that another firm of brokers procured the execution of the lease, without learning of the property or of the lessee through the plaintiff, he is not entitled to recover.⁷

A real estate broker employed to procure a tenant able and willing to pay a certain yearly rent and to furnish a part of the cost of erecting a twelve-story building on the premises, to be constructed on plans to be mutually agreed upon between the parties, cannot recover commissions where no plans for a twelve-story building were ever agreed upon and a contract between the owner and the prospective tenant was repudiated by the owner and abandoned by mutual consent, because of the financial inability of the proposed tenant to perform by reason of the fact that he was unable to satisfy judgments for large amounts entered against him. Where the complaint in such action alleges that the owner and the proposed tenant were to agree upon the plans for a twelve-story building, it is error to admit evidence that the owner and the proposed tenant subsequently negotiated as to the erection of a fifteen and one-half or sixteen-story building, as the difference in the proposed terms of the lease is radical.⁸

§ 198a. Commissions on Renewal of Lease (p. 207)

A broker who procures a tenant to enter into a lease for a term of years, with an option to the tenant for a further term, is entitled to commissions on the rental for the term of the lease, but, it seems, not upon the rental for the optional additional term unless the broker is the procuring cause of having the tenant exercise his option to take the extended term also. It is also suggested that although the owner promises to pay commissions on the rental for the extended term the broker cannot recover if the extended term is not to begin and such additional commissions are not to be paid until after the expiration of an original term of more than a year, unless the agreement to pay is in writing.⁹

⁶Thorpe v. Cameron, 191 Ill. App. 455 (1915). See also § 97.

⁷Loewenthal v. Klein, 159 App. Div. 334; 144 N. Y. Suppl. 593 (1913).

⁸Head note in Herron v. Cameron, 144 App. Div. 43; 128 N. Y. Suppl. 871 (1911).

⁹Allwin Realty Co. v. Barth, 161 App. Div. 568; 146 N. Y. Suppl. 960 (1914). See also § 26.

§ 202a. Commission on Sale of Leasehold (p. 211)

The employment of a broker to procure a purchaser for a leasehold interest in real estate may be proven, either by oral testimony or by a writing, and the contract is performed when the broker procures a purchaser ready, able, and willing to take the property at the seller's terms. It is not essential to a recovery that the broker should prove the execution of a written contract between the owner and the intending purchaser.¹⁰

¹⁰Wiederman v. Verschleiser, 95 Misc. 276; 159 N. Y. Suppl. 226 (1916). See opinion in same case on motion in trial court for new trial, 93 Misc. (453).

CHAPTER XXI

WHO IS LIABLE FOR COMMISSIONS

§ 204. The Employer Is Usually Liable for Broker's Commissions (p. 212)

One tenant in common cannot bind the other in the employment of a broker without the latter's acquiescence, nor can the latter be held on the theory of ratification unless such ratification be with full knowledge of all the material facts.¹¹

§ 205. Promises to Pay Commissions (p. 213)

Add to footnote 8, after Belleshein v. Palm:

Courtney v. Rhodes, 148 App. Div. 799; 133 N. Y. Suppl. 363 (1912).

§ 206. Liability of Persons Not Owning the Property (p. 214)

A person, although he may not be the owner of the property, who deals as principal, and who does not disclose his principal until after the broker has produced a purchaser ready and willing to purchase on the terms fixed by such person, is liable for the commissions earned by the broker.¹²

Where a third person without authority from, or knowledge of, the owner of lands employs a broker to procure a purchaser, he is personally liable to the broker for commissions when a sale is effected. But the owner himself is not liable.¹³

In an action by a broker to recover commissions for procuring a purchaser for real property, testimony by defendant, the owner of the property, that her husband acted for her and handled her property entirely and absolutely, is sufficient to show general authority in the husband to employ a broker, although special authority to do so is denied.¹⁴

Where a real estate broker is employed to procure a sale of real

¹¹*Pretzfelder v. Strobel*, 17 Misc. 152; 39 N. Y. Suppl. 333 (1896).

¹²*Taubenblatt v. Galewski*, 108 N. Y. Suppl. 588 (Sup. Ct. App. Term, 1908); *Mecker v. Claghorn*, 44 N. Y. 349; *Arfman v. Hare*, 27 Misc. 777; 57 N. Y. Suppl. 759; *Rounds v. Allee*, 116 Iowa 345; 89 N. W. 1098 (1902).

¹³*Kennon v. Poerschke*, 148 App. Div. 830; 133 N. Y. Suppl. 528 (1912).

¹⁴*Cannon v. Bannon*, 151 App. Div. 693; 136 N. Y. Suppl. 139 (1912); *Arnold v. Loomis*, 148 Pac. (Cal.) 518 (1915); cf. *Bierkamp v. Beuthien*, 155 N. W. (Iowa) 819 (1915).

property by one claiming to be the owner, and it later appears that the land was in fact owned by his wife, whose agent he was, it is the broker's duty after learning the facts to elect whether he will hold the husband for his commissions for failure to disclose the principal or whether he will hold the wife for the act of her agent. When the facts are known there is a duty to elect, and an election made with full knowledge of the facts is binding. Where the broker although knowing the facts sues both husband and wife jointly for his commissions, a judgment entered in his favor against both defendants will be reversed.¹⁵

"While there are numerous authorities that a debtor will not be held to have made an election in favor of the principal where he has proceeded against the agent without full knowledge of the facts, yet the weight of authority both in England and in this country is that where an election has been made with full knowledge of the facts it is controlling, and that where the facts are known there is a duty to elect."¹⁶

When a lawyer applies to a title company for a search, and discloses that he is acting for his client and assumes no personal liability, the title company cannot hold the lawyer personally for its fees.¹⁷

§ 207. Trustees, Executors, and Guardians (p. 217)

At end of first paragraph add footnote 21a as follows:

See also *Matter of Bielby*, 91 Misc. 353; 155 N. Y. Suppl. 133 (1915).

Although the broker knew his employer was assuming to act purely as executor, the action may properly be brought against the employer personally. The latter had no power to bind the estate by such a contract. "The general rule is well settled in this state that executors or trustees cannot, by their executory contracts, although made in the interest and for the benefit of the estate they represent, if made upon a new and independent consideration, bind the estate and thus create a liability not founded upon the contract or obligation of the testator."¹⁸

A trustee who pays a commission on the sale of the real estate

¹⁵*Cherrington v. Burchell*, 147 App. Div. 16; 131 N. Y. Suppl. 631 (1911); *Weil v. Raymond*, 142 Mass. 206; *Pittsburgh Plate Glass Co. v. Roquemore*, 88 S. W. 449; *Central Lumber & Mfg. Co. v. Reyburn Co.*, 189 Mo. App. 405; 176 S. W. 509 (1915).

¹⁶*Cherrington v. Burchell*, *supra*.

¹⁷*Title Guarantee & Trust Co. v. Sage*, 146 App. Div. 578; 131 N. Y. Suppl. 278 (1911). See also *Echols v. Howard* (Ga. App.) 86 S. E. 91 (1915).

¹⁸*Smith v. Peyrot*, 201 N. Y. 210, 215; 94 N. E. 662 (1911).

of the trust estate, will be allowed such payment on the settlement of his accounts.¹⁹ The same is true of an administrator.²⁰

But such amount paid for broker's commissions should be charged against the principal of the estate if there are persons to whom the income only of the estate is directed to be paid.²¹

Where real estate is devised to executors under a good trust and they are, as such trustees, directed to sell the same, the question arose whether an amount for broker's commissions, though not yet incurred, should be deducted from the assets of the estate in arriving at the net amount of the estate for the purpose of imposing an inheritance tax. An able judge has held that, if it shall appear that the expenditure for broker's commissions is reasonably to be required, the amount thereof should be deducted. "The sole question is whether or not it can be found as a fact that the executors are about to incur a necessary expense on the sales which they may be required to make under the will."²²

§ 207a. Corporations (p. 218)

Acts done by the executive officers of a corporation within the apparent scope of their authority in the regular business of the corporation are assumed to be its acts, and one dealing with such officers is not required to prove that they were given specific authority from the board of directors. But where a corporation is engaged in the business of renting lands, the sale of all its tangible property is not within the apparent scope of the business, and one seeking to recover commissions for procuring a purchaser must prove either that the officers were given authority to employ him or that their act was subsequently ratified. And thus it has been held that, where a broker suing for commissions has given evidence that the officers of the corporation, acting in its name, employed him to find a purchaser for all of its tangible property and that the property was actually sold to a customer procured by him, the burden is upon the defendant to show that its officers had no authority to employ the plaintiff and that the act of the officers was not ratified.²³

In like manner, it has been held that the president and actual general manager of a corporation engaged in selling land was act-

¹⁹See *Matter of Odell*, 164 App. Div. 929; 149 N. Y. Suppl. 435 (1914); *affd.*, 214 N. Y. 661.

²⁰*In re Willard's Estate*, 139 Cal. 501; 73 Pac. 240; 64 L. R. A. 554 (1903); see the note in L. R. A. last cited; *cf.* *Jacobs v. Jacobs*, 99 Mo. 427; 12 S. W. 457.

²¹*Matter of Fargo*, 72 Misc. 305; 125 N. Y. Suppl. 156 (1911).

²²*Matter of Shields*, 68 Misc. 264; 124 N. Y. Suppl. 1003 (1910).

²³*Lyon v. West Side Transfer Co.*, 132 App. Div. 777; 117 N. Y. Suppl. 648 (1909). Two of the 5 judges dissented.

ing within the scope of his authority in employing a selling agent, and agreeing that the corporation would pay for his services, though no resolution had been passed appointing him general manager.²⁴

But where the directors of a corporation employed a broker on the express condition that any proposition submitted by him should be approved by the board before he should be entitled to commission, there can be no recovery of commissions in the absence of such approval.²⁵

Where it is alleged that the broker was hired by the president of a corporation, and the brokerage employment was for the sale of real estate, and thus related to a transaction entirely outside of the scope and purposes of a manufacturing corporation, the president cannot bind the corporation for the broker's services simply because he was its executive officer. The president's authority to act for the corporation is limited by the legitimate scope of its business as defined by its charter, and it can never be presumed that an officer of a manufacturing corporation has authority to transact business which the corporation itself is not authorized by its charter to transact, and persons dealing with a corporation are bound to take notice of the limitations upon the powers of their agents. And so, should a president of a manufacturing corporation assume to make an agreement in behalf of his corporation to hire brokers to sell his individual real estate, he could not bind the corporation by such action, for it is not within the apparent scope of his authority as president of such company. Or should the president of a manufacturing company state to a broker that certain real estate belonged to the corporation, there would still be no ground for the broker to stand upon, for it is not within the apparent authority of a president of a manufacturing corporation to sell its plant and machinery. If a plant is a part of a manufacturing equipment of a corporation, it is not within the apparent scope of the authority of the president of the company to sell the same, and, as it is not, there can be no presumption that a person holding the office of president is acting for a corporation in hiring a broker to sell the same.²⁶

Where an employee of a steamship corporation is designated as its general manager, and a person would have the right to assume that any contract with respect to the transportation business of the company was within the authority of such general manager,²⁷ yet

²⁴Hoffman v. Guy M. Rush Co., (Cal. App.) 149 Pac. 177 (1915).

²⁵Roberts v. New & Beaver St. Corp., 138 App. Div. 47; 122 N. Y. Suppl. 989 (1910).

²⁶McCorry v. Wiarda, 149 App. Div. 863; 134 N. Y. Suppl. 667 (1912).

²⁷Citing Rathbun v. Snow, 123 N. Y. 343; 25 N. E. 379; 10 L. R. A. 355; Sistare v. Best, 88 N. Y. 527; Norton v. Genesee Nat. Savings Assn., 57 App. Div. 520; 68 N. Y. Suppl. 32.

a broker would have no right to assume that such general manager had authority to employ him to negotiate a sublease of a lease the corporation held.²⁸ The question is not with respect to the authority such general manager assumed to exercise, but with what appearance of authority the corporation clothed him.²⁹ If the corporation, with knowledge that its general manager employed a broker, accepts a customer produced by him, and makes a contract on a proposition which he was authorized to submit, it would be bound by the employment on the theory of ratification,³⁰ but if the general manager is not authorized to employ a broker, the corporation is not chargeable with any knowledge possessed by the general manager and not communicated to any officer of the corporation and if no officer has actual knowledge, the corporation cannot be held on the theory of ratification for having accepted the fruits of the broker's services.³¹

§ 208. Commissions from Purchaser (p. 218)

In second paragraph, after words, "are not unusual," add footnote 27a:

Roberts v. Martin (Ga. App.) 82 S. E. 813 (1914).

§ 209. Purchaser's Promise to Pay Commission (p. 219)

Add to footnote 31:

Cf. Urtz v. N. Y. C. & H. R. R. Co., 202 N. Y. 170; 95 N. E. 711 (1911).

§ 210a. Purchaser's Liability for Commissions on Refusal to Purchase (p. 221)

Refusal to comply with an agreement to purchase real estate by reason of which the broker who negotiated the sale is deprived of his commissions, will render the intending purchaser liable for the damages thereby inflicted on the broker, although he had agreed to look to the seller for his commissions.³²

"It would seem to be immaterial whether in the original negotia-

²⁸Lord v. U. S. Transportation Co., 143 App. Div. 437; 128 N. Y. Suppl. 451 (1911); citing Camacho v. Hamilton Bank Note & Eng. Co., 2 App. Div. 369; 37 N. Y. Suppl. 725; Leonardi v. Times Sq. Auto Co., 127 App. Div. 193; 111 N. Y. Suppl. 523; Norman v. Loomis, etc. Co., 123 App. Div. 739, 740; 108 N. Y. Suppl. 261; Norton v. Genesee Nat. Savings Assn., 57 App. Div. 520; 68 N. Y. Suppl. 32; Brewster v. Wilson, 30 App. Div. 494; 52 N. Y. Suppl. 272; Benedict v. Pell, 70 App. Div. 40, 45; 74 N. Y. Suppl. 1085; Cohn Co. v. Lee, 132 App. Div. 697; 117 N. Y. Suppl. 550; Alexander v. Cauldwell, 83 N. Y. 480; Jacques v. Todd, 3 Wend. 91.

²⁹Lord v. U. S. Transportation Co., *supra*, citing Hay v. Platt, 66 Hun. 488, 491; 21 N. Y. Suppl. 362; Edwards v. Dooley, 120 N. Y. 540; 24 N. E. 837.

³⁰Lord v. U. S. Transportation Co., *supra*, citing Lee v. Pittsburgh Coal & Mining Co., 56 How. Pr. 373; *affd.*, 75 N. Y. 601; Smith v. Martin, etc. Co., 47 N. Y. St. Repr. 26; 19 N. Y. Suppl. 285; *mem.* 64 Hun 639.

³¹Lord v. United States Transportation Co., 143 App. Div. 437; 128 N. Y. Suppl. 451 (1911).

³²Livermore v. Crane, 26 Wash. 529; 67 Pac. 221; 57 L. R. A. 401 (1901); Clark & Skyles on Agency, pp. 1696, 1697.

ation or the sale the plaintiff was the agent of the vendor or the purchaser. The complaint here is for the violation of the contract to purchase, from which violation damages directly result to plaintiff." ³³

In *Hunter v. Lyons*,³⁴ this doctrine was also applied to an exchange, and it was there held that where both parties to a trade knew of and assented to contracts by the broker for commissions from both of them, and he was the efficient cause of the trade, upon a refusal by one of the parties to perform, the broker may recover from him, not only the commission which he contracted to pay, but also that which he would otherwise have received from the opposite party. It was also said that it is not essential that the party so to be held should know the amount of commission the broker was to receive from the other side of the exchange, it being sufficient to charge him with liability if he knew and consented to the other side's agreeing to pay some commission to the broker.

Yet in *Le Master v. Dalhart Real Estate Agency*, ³⁵ it was said: "It was clearly decided by our Supreme Court on writ of error in *Tinsley v. Dowell*,³⁶ that a mere selling agent or broker has no such interest in a contract for the purchase of land secured by him, as authorizes a recovery of damages in the way of lost commissions from the proposed purchaser who has refused to comply with the contract. To the same effect is the decision in the case of *Tinsley v. Anderson*,³⁷ by the Court of Civil Appeals of the Fourth Judicial District."

In *Tinsley v. Dowell*,³⁸ it appeared that the broker had been authorized to sell and on behalf of the owners had entered into a contract of sale with the purchaser, and the court said that the broker had no such interest as to give him a right to maintain a suit for the breach of the contract to purchase the land, and that if the purchaser refused to comply with his contract he would be liable to the owner for the damages. The court advanced general arguments to sustain its position that the broker could not, in that

³³*Livermore v. Crane*, *supra*. In this case an agreement in writing had actually been made between purchaser and seller and a deposit paid and the broker was to receive his commission from the seller from time to time as various payments were to be made on the contract of sale by the purchaser. While in some states a broker is not entitled to his commissions until he brings about a written contract between seller and purchaser, that doctrine does not prevail universally and the broker is generally entitled to his commissions when he succeeds in having the minds of the parties meet. See § 117.

³⁴(Tex. Civ. App.) 144 S. W. 353 (1912).

³⁵56 Tex. Civ. App. 302; 121 S. W. 185 (1909).

³⁶87 Tex. 23; 26 S. W. 946.

³⁷33 S. W. 266.

³⁸87 Tex. 23; 26 S. W. 946 (1894).

case, recover on any theory, from the purchaser, notwithstanding that the broker had an interest in the sale to the extent of all over a minimum price which the owner had fixed.

Tinsley v. Anderson,³⁹ was decided on the authority of *Tinsley v. Dowell*, *supra*. The head note reads: "Plaintiff, who was authorized to sell certain land for the owners (his compensation to be any excess of a specified price), procured a written offer from defendant to purchase the same at a price in advance of that fixed by the owners; but defendant refused to comply with his contract, though the owners of the land executed to him a deed thereof. There was nothing to indicate that the land, at the time of the default, was not worth the sum which defendant agreed to pay. Held, not to show any relation of principal and agent, so as to render defendant liable for the difference between the fixed price and the amount which the latter agreed to pay."

In *Donnelly v. Chetajian*,⁴⁰ it was held that the intending purchaser is not liable for commissions where before acceptance by the seller, the proposed purchaser withdrew his offer to buy land carried by the broker on his books for sale for the owner, no promise or word with reference to payment of commissions by the proposed purchaser being shown.

An intending purchaser may, of course, negotiate for the purchase of property, and if he finds that he is unable to purchase on terms wholly satisfactory to himself, he may abandon the negotiations whenever he wishes, without incurring any liability for the commissions lost by the broker.

So too, if the broker represents the seller and a written contract of sale is entered into between buyer and seller, the commissions would be due from the seller, and no liability would be incurred by the purchaser for the loss of any commissions if the purchaser refused to carry out his contract of purchase. In such case, the broker, having brought about a contract of sale, is undeniably entitled to his commissions from the seller and the seller could enforce the contract of sale against the purchaser, or not, just as he chose.

In *Hevia v. Wheelock*,⁴¹ A and B had agreed in writing to exchange lands, and, before delivery or exchange of deeds, A employed a broker to procure a loan on the property to be conveyed by B to A. B subsequently refused to carry out the contract of exchange. It was said that the broker having procured the loan could recover his commissions from A, but the broker

³⁹ 33 S. W. 266 (1895).

⁴⁰ 115 N. Y. Suppl. 125 (App. Term, 1909).

⁴¹ 162 App. Div. 759; 148 N. Y. Suppl. 165 (1914).

could not recover the amount of these commissions from B on the theory that by B's refusal to carry out the contract for exchange the broker was prevented from earning and receiving his commission. It was further stated that A on suing B for breach of his contract of exchange could probably recover as an item of damage, the amount A paid the broker for procuring the loan, providing the agreement with the broker to procure the loan was made with the knowledge and consent of B.

As to B's liability to the broker for the commissions he would have been paid by A on the exchange had the contract been carried out, the court said that if such commissions were only to be paid upon the consummation of the exchange, then such commissions never became due from A. If they did become due when the contract for exchange was executed, B's breach of the contract with A would not absolve A from the payment of the commission to the broker.

While the authorities on this subject are not abundant, yet it is difficult to draw from these authorities any principle which may be laid down as general. In such states where the doctrine prevails that a broker is not entitled to commissions until he has procured an executed contract,⁴² it may be argued that in no case could a broker have a cause of action against the purchaser for the commissions lost by the broker by reason of the refusal to purchase. The broker would not be entitled to commissions from the seller until he has brought about an executed contract, and therefore would not have been entitled to commissions from the seller until the broker had done so, and consequently could have suffered no loss. Yet even in such case, the question is open to debate, for the seller may be perfectly willing to enter into the contract after all the terms have been agreed upon, and the purchaser's refusal would be the reason for the loss of the commissions.

In those states wherein the doctrine prevails that broker's commissions are earned when the broker produces a purchaser ready, willing, and able to purchase on his principal's terms, the broker could have no right of action against the purchaser if he refused to perform after having made a written contract of purchase. In such case, the seller would be obligated to pay the commissions and enforce the contract of sale against the purchaser or not, as he chose. Where, however, all the terms of sale have been agreed upon, and the purchaser has accepted the terms, and then changes his mind and refuses to carry out his acceptance, the seller being

⁴²See § 117.

ready and willing, the broker would not be entitled to commissions from the seller because the broker had not produced a purchaser ready, willing, and able, yet for the change of mind or refusal on the intending purchaser's part, he would have produced such. In the latter case, the broker ought to be entitled to recover the lost commissions from the intending purchaser.⁴³ In all such cases, however, strict and convincing proof should be required so that no injustice be done to one who merely negotiated to purchase and then abandoned the negotiations without actually having come to final and settled terms.

§ 210b. Misrepresentation by Purchaser to Seller as to Who is Broker (p. 221)

False representations on the part of the purchaser of real estate by which the seller is induced to pay the broker's commissions to one who is not the procuring cause of the sale, give no right of action against the purchaser, for such commissions, to the broker who really procured the sale. Neither could the broker recover the commissions from the other broker who received them from the seller. The real broker's remedy is still against his principal, the seller, and if the seller has been induced by fraud to pay the commissions to one broker, while another was the real procuring cause of the sale, the seller alone may proceed against the purchaser for such fraud.⁴⁴

⁴³See also cases under § 334.

⁴⁴Cohen v. Hershfield, 16 Daly 96; 9 N. Y. Suppl. 512; 30 N. Y. St. Rep. 436 (1890).

CHAPTER XXII

AMOUNT OF COMPENSATION

§ 214. Measure of Compensation (p. 223)

As to recovery by broker on failure of parties to carry out exchange contract, of the following items: (1) commission on exchange from both parties; (2) commission on loan procured for one of the parties; (3) amount broker obligated himself for in procuring examination of title, see *Hevia v. Wheelock*.¹

§ 214a. Promise to Pay Increased Commissions (p. 224)

Where a broker employed to find a purchaser for lands agreed to accept \$1,000 for his services in procuring a certain purchaser at a time when all the negotiations between the parties had been completed, the sale consummated, and the officers of the purchaser, a corporation, had authorized the execution of a contract of sale and a check for the payment of the earnest money to the vendor was ready for delivery, so that all that was necessary to complete the contract was for the vendor to sign the agreement and receive the check, there was no consideration for a subsequent promise to pay the broker an increased price for his services, no additional services having been rendered.²

§ 216. Agreements for All in Excess of Fixed Price (p. 225)

In third paragraph, after sentence, "The same ruling has been applied in other jurisdictions," add footnote 8a:

Louva v. Worden, 30 N. D. 401; 152 N. W. 689 (1915).

§ 217. Rule as to All in Excess of Fixed Price (p. 226)

Where a broker is to receive one-half of all in excess of a fixed amount he obtains as the purchase price, it was held that he cannot, in the absence of allegations showing he has no adequate remedy at law, sue in equity for an accounting against his principal even though the broker does not know how much was received

¹ 162 App. Div. 759; 148 N. Y. Suppl. 165 (1914).

² *Mayer v. Penfield*, 150 App. Div. 66; 134 N. Y. Suppl. 762 (1912).

by his principal in excess of the fixed amount. His remedy is said to be an action at law for the agreed value of the services rendered, and if he does not know the exact amount to sue for, he may commence his action, and then examine the defendant to enable the broker to frame his complaint or to reveal facts showing whether the broker has an adequate remedy at law or requires the aid of a court of equity.³

Yet the same courts have repeatedly denied the right of a plaintiff to examine a defendant in order to obtain facts to frame a complaint, and have held that such an examination will only be granted under most unusual circumstances.

A grantee of real property is liable on a check given in part payment and transferred by the grantor to his agent, although the latter when negotiating the sale told the vendee that the owner would not sell for less than a certain price, when as a matter of fact the vendor had told the agent that he should receive for his services any sum he succeeded in obtaining above a stated sum, which was less than the consideration paid, and the check transferred to the agent represented the excess. As the agent was not acting for the grantee and owed no duty to him, the misstatement of fact does not prevent a recovery so long as there was no misrepresentation as to the value of the property.⁴

§ 224. Proof of Custom (p. 233)

Where a broker sues for commissions, he may himself testify as an expert to the customary rate of commissions, if it appears that he has had such experience which would make him familiar with the customary rate.⁵

Add to footnote 49 (p. 234) before words, "A custom contravening":

Higgins v. Moore, 34 N. Y. 417, 422 (1866).

§ 226. Compensation in the Absence of Agreement or Usage (p. 236)

In a real estate broker's action for commissions for furnishing a tenant for property, evidence of real estate agents as to the value of plaintiff's services was admissible, though the witnesses had no experience in the real estate business in the city where the services

³*Stewart v. Auerbach*, 148 App. Div. 222; 132 N. Y. Suppl. 1021 (1911).

⁴*Aronowitz v. Woollard*, 166 App. Div. 365; 152 N. Y. Suppl. 11 (1915).

⁵*Van Doren v. Jelliffe*, 1 Misc. 354; 48 N. Y. St. Rep. 784; 20 N. Y. Suppl. 636 (1892).

were rendered, there being no evidence that the value of such services was different in such city from that in other places, or that there was any custom or fixed rates there prevailing different from other places.⁶

⁶*Floore v. Burgher*, (Tex. Civ. App.) 128 S. W. 1152 (1910).

CHAPTER XXIII

WHEN COMMISSIONS ARE DUE

§ 228. Rule as to When Commissions Are Due (p. 238)

"When a broker, as a part of his employment, assumes to execute for his principal an executory contract of sale or exchange, he does not become entitled to his commission unless the other contracting party is able to perform the contract on his part."⁷

§ 230. Unsupported Agreements to Wait for Commission (p. 241)

"A broker is entitled to his commissions when he has produced a purchaser ready and willing to enter into a contract on the employer's terms; and where the broker has produced a purchaser ready and willing to contract on the terms stipulated, a subsequent agreement, without consideration, not to claim his commissions until the happening of some other contingency, is not binding on him, and a recital in such agreement that it is in consideration of the execution of the contract of sale does not establish a valid consideration, as the procuring of the contract of sale was the consideration for the broker's commissions."⁸

Where a broker signs a written agreement to waive his commissions if the contract of sale is not performed, and the broker then sues for his commissions, although the contract of sale was not performed, he claiming that the written agreement to waive commissions was obtained by fraud and false representations and that therefore his original oral agreement of employment was revived, the City Court of New York, being an inferior local court and without general equity jurisdiction, cannot grant any relief by way of setting aside or rescinding the written brokerage contract because of fraud or false representations.⁹

A suggestion worthy of quotation is made in one case wherein it is said that, "there is quite a distinction between contracts of brokers containing the condition that commissions are only to be

⁷Inge v. McCreery, 60 App. Div. 557; 69 N. Y. Suppl. 1052 (1901).

⁸Taubenblatt v. Galewski, 108 N. Y. Suppl. 588 (Sup. Ct. App. Term, 1908), citing McComb v. Von Ellert, 7 Misc. 59; 27 N. Y. Suppl. 372; Moskowitz v. Hornberger, 15 Misc. 645; 38 N. Y. Suppl. 114; Hough v. Baldwin, 50 Misc. 546; 99 N. Y. Suppl. 545.

⁹Wiederman v. Verschleiser, 93 Misc. 453; 158 N. Y. Suppl. 308 (1916).

paid, viz., 'when deed is actually delivered' or 'title closed,' or 'when title is passed,' or 'on closing of title,' or 'commissions not to be due or payable until title is passed.' There can be found expression of opinions in the books covering all such conditions wherein a broker can or cannot recover unless an enforceable contract is fully carried out, and also holding to the effect that the payment of the commissions is suspended until the certain event has happened. But each case must be decided upon its own facts."¹⁰

Add to footnote 16:

Bernstein v. Fulson Realty Co., 152 N. Y. Suppl. 995 (1915).

§ 231. Valid Agreements Deferring Payment of Commissions (p. 243)

Where the only evidence of an employment or of an agreement to pay commissions is furnished by the clause in the contract that the seller agrees that a certain person is the broker who brought about the sale, and agrees to pay his commissions, and that he "shall be entitled to his commission upon passing of title as agreed," the broker cannot recover unless he proves that title passed.¹¹

This decision apparently has its basis in the fact that the broker having shown no prior employment, the contract clause must be assumed to be the evidence of his employment, and that the agreement to wait for commissions is valid because being part of the contract of employment.

In *Williams v. Ashner*,¹² the brokers had begun negotiations to bring about a lease, but before they had really produced anyone ready, willing, and able to enter into a lease, the landlord insisted that the brokers sign an agreement that no commissions would be paid unless a lease between certain named persons was actually executed, and the court held the agreement valid, and denied commissions on failure of the broker to show that such a lease had actually been signed.

In *Colvin v. Post Mortgage & Land Co.*,¹³ the opinion states that while the broker's negotiations for a sale were pending, "it was orally agreed by defendant (the principal) that if plaintiff (the broker) would find a buyer and defendant should sell the land for \$150,000 plaintiff should be paid a commission of ten per cent.

"On April 18, 1913, the agreement between plaintiff and

¹⁰*Meckes v. Mullen*, 75 Misc. 303, 304; 132 N. Y. Suppl. 942 (1912).

¹¹*Reis Co. v. Zimmerli*, 170 App. Div. 502; 155 N. Y. Suppl. 327 (1915).

¹²152 App. Div. 447; 137 N. Y. Suppl. 275 (1912).

¹³173 App. Div. 85; 159 N. Y. Suppl. 361 (1916).

defendant was reduced to writing and signed by both. This agreement recited plaintiff's negotiation of a sale of the property for \$150,000, and provided" for the payment of commissions on instalments of the purchase price as received by defendant. The court said:

"The plaintiff has evolved an ingenious theory by which he seeks to avoid the application of the rule that where parties have deliberately entered upon a written agreement, all prior negotiations and agreement upon the subject-matter thereof will be deemed to be merged therein. His argument is that by reason of his employment to find a purchaser and his success in so doing an obligation arose on the part of the defendant to pay his commissions, and that the subsequent written agreement specifying how and when the commissions should be paid was without consideration and void. If this contention should be permitted to prevail, there would be an end of the salutary rule now so strongly entrenched in our law. That rule is based upon the soundest principles of public policy and is not to be overturned at this late day. There is a conclusive presumption in such a case that the written document expresses the consummated agreement between the parties, and neither will be heard to assert that it differs from a prior oral agreement covering the same subject."

§ 232. **Contingent Commission Agreements** (p. 243)

Where a contract for the sale of real estate provided for the payment of a broker's commission to the broker when the title closed and not otherwise unless the failure to close title was caused by fault of the vendor, and the seller returns the deposit because the vendee's assignee is irresponsible and unwilling to complete, the broker is not entitled to commission.¹⁴

Add to footnote 31 (p. 244):

Dean v. Williams, 56 Wash. 614; 106 Pac. 130 (1910).

§ 233. **Construction of Agreements to Wait until Title Is Closed** (p. 245)

Add to footnote 37 (p. 246):

See also Meckes v. Mullen, 75 Misc. 303; 132 N. Y. Suppl. 942 (1912).

§ 235. **Commissions on Instalment Sales** (p. 248)

Where a written contract employing a real estate broker to find a purchaser for lands expressly provided that he should receive as

¹⁴Ivins Co. v. Martin Holding Co., 84 Misc. 437; 146 N. Y. Suppl. 126 (1914).

commissions a certain percentage of the purchase price "payable pro rata from each instalment of the purchase price as and when the same is received" by the seller, the final instalment of the commission being made payable when the sale was finally completed, and also expressly provided that if the purchaser should terminate the contract the rights of the broker "shall be thereby terminated," he cannot recover commissions except upon actual payments made by the purchaser to the seller. Any prior oral agreement to the effect that the plaintiff should be entitled to commissions if he found a purchaser, is merged in the subsequent written agreement, and the theory that the restrictions placed upon the rights to commissions in the written agreement were without consideration is untenable.¹⁵

A provision in an agreement with a broker for the sale of lots on the instalment plan which read as follows: "Where lots are sold on the instalment plan out of each instalment the said Van Varick shall receive sixty (60) per cent, until the total amount of his commissions is paid," was construed to mean that the commissions should be paid only out of instalments actually received by the principal.¹⁶

Where a broker is working for a land company on instalment sales under an arrangement by which the land company is to give the broker one week's notice before it may cancel any contracts because of default in the payments of the instalments of the purchase price, the broker is entitled to at least nominal damages against the land company for cancellation of any contracts without notice to him, and if the broker can show the financial ability of the purchasers to continue payment of the instalments, he may possibly be entitled to substantial damages for the cancellation without notice to him, inasmuch as the notice to the broker was intended to give him an opportunity to persuade the purchasers to continue their payments.¹⁷

¹⁵Colvin v. Post Mortgage & Land Co., 173 App. Div. 85, 86; 159 N. Y. Suppl. 361 (1916).

¹⁶Van Varick v. Suburban Investment Co., 76 Misc. 593; 135 N. Y. Suppl. 299 (1912).

¹⁷Benequit v. N. Y. & N. J. Real Estate Imp. Co., 148 App. Div. 628; 133 N. Y. Suppl. 226 (1912).

CHAPTER XXIIIa

SUNDAY SALES

(To follow page 249)

§ 235a. General Statement

Although Sunday sales are of frequent occurrence, only one case has been found reported in which the broker's right to commissions has been disputed, although unsuccessfully, on the ground that the sale was made on Sunday.¹ Cases involving criminal prosecution for selling goods or merchandise on Sunday are numerous, and an occasional prosecution for selling land on Sunday may also be found.²

The justification and non-justification of Sunday sales will not be discussed. It is only the legal aspect, and not the moral aspect, which is to be presented.

Sunday ordinarily commences at twelve o'clock on the night between Saturday and Sunday and ends twenty-four hours thereafter. In Connecticut, it legally begins at sunset on Saturday and ends at the same time on the next day.³

§ 235b. Sunday Contracts Not Prohibited by Common Law

The common law did not prohibit business on Sunday.⁴ And so, the common law never prohibited the making of contracts on Sunday.⁵ Yet it is said that Sunday is among the most ancient institutions of the Christian religion, and the Christian system of religion is recognized as constituting part of the common law.⁶

"At the common law, the fact that a contract was executed on Sunday did not vitiate or affect it; but in many of the American states statutes have been adopted which have been construed by their courts as having the effect of annulling any contract executed and delivered on Sunday, on the ground that such statutes prohibit the making of contracts on that day, and that all contracts made on

¹See § 235d.

²See § 235d.

³Finn v. Donahue, 35 Conn. 216.

⁴37 Cyc. 545.

⁵Shuman v. Shuman, 27 Penn. St. 90 (1856).

⁶Shaver v. State, 10 Ark. 259.

said day were in violation of such statutes, and were therefore null and void. All the authorities agree that whether or not a contract is affected by the fact of having been executed on Sunday depends upon the terms and provisions of the state statute on the subject."⁷

Most of the statutes specifically allow the sale of articles such as milk, tobacco, confections, etc., and many give express sanction to the running of railroads, ferries, operation of power plants, etc., and to the printing and publication of newspapers on Sunday.

The general rule is that a contract which is completed on a secular day is not void because negotiations therefor have been conducted on Sunday.⁸

The authorities, for the most part, hold that the mere fact that the terms of a sale were agreed upon on Sunday will not invalidate a contract, where the delivery and payment took place on a secular day, it being generally held that delivery and payment in themselves were sufficient to constitute a complete contract regardless of what may have taken place on Sunday.⁹

§ 235c. Liberal or Strict Construction of Sunday Laws

In some states the Sunday laws, being enacted as penal statutes, are strictly construed.¹⁰

In New York, the Sunday laws are incorporated principally in the Penal Law.¹¹ It is provided by the New York Penal Law itself that, "the rule that a penal statute is to be strictly construed does not apply to" the Penal Law, "or any of the provisions thereof, but all such provisions must be construed according to the fair import of their terms, to promote justice and effect the objects of the law."¹² When one speaks of construing a penal statute strictly, it is not intended thereby to suggest a strict enforcement of the law but rather a strict construction of the law in favor of the accused.

"While questions have been raised as to noiseless and inoffensive occupations that can be carried on by one individual without requiring the services of others, as well as to persons who observe the seventh instead of the first day of the week, still the rule is believed to be general throughout the Union, although not generally enforced, that the ordinary business of life shall be suspended on Sunday

⁷Hooks v. State, 58 Fla. 57; 50 So. 586 (1909).

⁸See note in 20 A. & E. Ann. Cases 36, to Burr v. Nivison, 75 N. J. Eq. 241; 72 Atl. 72 (1909).

⁹See note in 20 L. R. A. (N. S.) 86, to King v. Graef, 136 Wisc. 548; 117 N. W. 1058 (1908).

¹⁰Hooks v. State, 58 Fla. 57; 50 So. 586 (1909), construing § 3565, Fla. Gen. St. 1906.

¹¹§ 2140 *et seq.*

¹²§ 21, N. Y. Penal Law.

in order that thereby the physical and moral well-being of the people may be advanced. The inconvenience to some is not regarded as an argument against the constitutionality of the statute, as that is an incident to all general laws. Sunday statutes have been sustained as constitutional almost without exception. . . . While works of charity and necessity have usually been excepted from the effect of laws relating to the Sabbath, and sometimes, also, those persons who keep another day of the week, still quiet pursuits have not, even when they can be carried on without the labor of others, because general respect and observance of the day, so far as practicable, have been deemed essential to the interest of the public, including as a part thereof those who prefer not to keep the day, as their health and morals are entitled to protection, even against their will, the same as those of any other class in the community. According to the common judgment of civilized men, public economy requires, for sanitary reasons, a day of general rest from labor, and the day naturally selected is that regarded as sacred by the greatest number of citizens, as this causes the least inconvenience through interference with business."¹³

§ 235d. Commissions on Sunday Sales

It has been held that where there is an entire contract to do certain work, the most of which is to be done on Sunday, the contract is void.¹⁴

But it has also been held that where an exchange was brought about by a broker, and the exchange contract was executed on a Sunday, that fact would not deprive the broker of his commissions, particularly so if all the arrangements had been agreed upon the day before.¹⁵

In the case referred to, the court said: "This agreement took place on Saturday evening, April twenty-second. The fact that the contract which the parties had entered into was not formally signed and delivered until the day following was a circumstance wholly immaterial, and, in no way, affected the right of the plaintiff to recover under his pleading. At common law, the making of a contract on Sunday is not void.¹⁶ Section 2143 of the Penal Law, which

¹³*People v. Havnor*, 149 N. Y. 195; 43 N. E. 541; 52 Am. St. Rep. 707; 31 L. R. A. 689 (1896); writ of error dismissed, 170 U. S. 408; 42 L. Ed. 1087 (1898). Cf. § 235d.

¹⁴*Telfer v. Lambert*, 79 N. J. Law, 299; 75 Atl. 779 (1910); citing *Stewart v. Thayer*, 170 Mass. 560; 49 N. E. 1020; *Handy v. St. Paul Pub. Co.*, 41 Minn. 188; 42 N. W. 872; 4 L. R. A. 466; 16 Am. St. Rep. 695; *Williams v. Hastings*, 59 N. H. 373; *Fountain Sq. Theatre Co. v. Evans*, 4 Ohio Dec. 151.

¹⁵*McCormick v. Hazard*, 77 Misc. 190; 135 N. Y. Supl. 91 (1912).

¹⁶Citing *Batsford v. Every*, 44 Barb. (N. Y.) 618; *Miller v. Roessier*, 4 E. D. Smith (N. Y.) 235.

prohibits the performance of 'labor' on Sunday, and section 2146 of that law, which prohibits trades, manufactures, agricultural or mechanical employments on Sunday, do not condemn or render void a contract signed on that day. The Sunday laws are to be liberally construed, and acts done on that day, which do not disturb or interfere with others, and are not contrary to the design sought to be accomplished by such laws, are not illegal.¹⁷ Thus, a deed delivered on that day is sufficient to pass title.¹⁸ And our Court of Appeals has held that a contract for the sale of property made on Sunday is not, for that reason, void.¹⁹ Other cases asserting the same principle are collated in a note to *Batsford v. Every* (*supra*).

"We think that the evidence shows that the plaintiff completed his services on Saturday, and that his right to his commissions accrued at that time. Even if it could be held that, in view of the allegation of his pleading, the right to his commissions did not accrue until the contract was signed, the fact that the parties to the exchange executed that contract on Sunday did not operate to deprive the plaintiff of the fruits of his labor."²⁰

The New York Court of Appeals in *People v. Dunford*²¹ held that nothing in the reading of section of the New York Penal Law would suggest to the ordinary mind that the "public traffic" to be prohibited related to an effort to sell real estate such as the defendant in that case was proved to have made. In that case the complainant, a detective sergeant, met the defendant upon a railroad train on Sunday, and the defendant accosted him and showed him a map of lots and the complainant asked the price of a lot and, upon being informed, stated that he did not think he would buy; that he would think the matter over and call during the week. The train carried a number of persons to a point where land had been mapped out into lots for selling purposes but the only act which was shown on the defendant's part in the way of a business transaction was his offering of lots of land for sale to the complainant. The court held that this was not a violation of the section of the Sunday law referred to, but added: "We may assume that the defendant was interested in inviting public attention to a proposed sale of lands. If it had been shown that a concourse of persons had been attracted, with accompaniments of a noisy character, or, even, that there had been an offering of the lands at public auction, perhaps, a case of

¹⁷Citing *Northrup v. Foot*, 14 Wend. (N. Y.) 248; *Smith v. Wilcox*, 24 N. Y. 354. Cf. § 235c.

¹⁸Citing *Shuman v. Shuman*, 27 Penn. St. 90.

¹⁹Citing *Eberle v. Mehrbach*, 55 N. Y. 682.

²⁰*McCormick v. Hazard*, *supra*.

²¹207 N. Y. 17; 100 N. E. 433; 1 L. C. A. 141 (1912).

Sabbath breaking might have been made out under section 2145, which prohibits 'all noise disturbing the peace of the day.' No such charge, however, was made."

§ 235e. Sunday Laws of Various States

In New Jersey the statute provides, "That no travelling, worldly employment or business, ordinary or servile labor or work either upon land or water (works of necessity and charity excepted), . . . shall be done . . . on the Christian Sabbath, or first day of the week, commonly called Sunday."²²

So in New Jersey a parol agreement to sell land made on Sunday was held void because the bargain was made on Sunday, and that no subsequent recognition of it, short of a new bargain, could give it validity.²³

An Illinois case,²⁴ construing §261 of the Illinois Criminal Code, holds that the act of labor on Sunday is not an offense if done in a way not to disturb the peace and good order of society.²⁵

Worldly employment or business on Sunday is made a punishable offense in Pennsylvania.²⁶

The Pennsylvania Sunday law²⁷ merely denounces a penalty for violation of its provisions, and does not expressly annul or avoid the act done.²⁸

The effect of such provisions on executory contracts, as distinguished from executed contracts, is discussed in the following section.

In Massachusetts, all manner of labor, business or work, except works of necessity or charity, is prohibited, under fine.²⁹

The Wisconsin statute³⁰ inflicts a fine on any person who does any manner of labor, business, or work, except only works of necessity and charity, on Sunday.

The Florida statute provides, "Whoever follows any pursuit, business or trade on Sunday, either by manual labor or with animal or mechanical power, except the same be work of necessity, shall be punished by a fine not exceeding \$50."³¹

²²N. J. R. S. 595, 608, Vol. 3, Gen. St. N. J. p. 3707.

²³Ryno v. Darby, 20 N. J. Eq. 231 (1869).

²⁴Foll v. People, 66 Ill. App. 411 (1896).

²⁵This case digests: Johnston v. People, 31 Ill. 473; Scammon v. City of Chicago, 40 Ill. 146; Richmond v. Moore, 107 Ill. 433; McPherson v. Village of Chebanse, 114 Ill. 49; Eden v. People, 161 Ill. 296.

²⁶3 Sm. L. 177, § 1; Pepper & Lewis' Dig. Vol. 2, p. 4406.

²⁷Stat. of Apl. 22, 1794.

²⁸Shuman v. Shuman, 27 Penn. St. 90 (1856).

²⁹Mass. R. L. Ch. 98, §2, as amended by Act of June 9, 1904.

³⁰Wisc. St. 1898, §4595.

³¹§3565, Fla. Gen. St. 1906. See §235g as to construction of this statute.

§ 235f. Effect of Sunday Laws on Executory and on Executed Contracts

In *Shuman v. Shuman*,³² it was said that the construction usually given to the act of 1794, is that contracts made on Sunday are void, agreeably to the principle that every contract made for or about any matter or thing which is prohibited or made unlawful by statute is a void contract, though the statute does not mention that it shall be so but only inflicts a penalty on the offender, because a penalty implies a prohibition though there are no prohibitory words in the statute. "This rule was predicated of an *executory* contract. . . . The law will not lend its aid to *enforce* a contract made in violation of the provisions of a statute; but the question now presented is whether the law will undo such a contract when the parties themselves have fully executed it. . . . If two men agree on Sunday to exchange horses, their contract, so far as respects any legal remedies, is void; but if they *make* the exchange in pursuance of their agreement, will the law compel them to trade back? The answer to these questions is obvious. A contract not void at common law, nor expressly avoided by any statute, and which has been fully executed by the parties, binds them although it was made on Sunday."

§ 235g. Sunday Statutes Which Do Not Affect Sunday Contracts

Under the Florida statute,³³ it was said that, "The execution of a note, mortgage, or other contract requires neither manual labor nor any animal or mechanical power, and we do not think that their execution on Sunday is prohibited by this statute, and that, consequently, the validity of any contract made in this state is not affected by the fact that it was executed or delivered on Sunday. The purpose of our statute, when all of its provisions are considered, seems to be to prohibit the performance on Sunday only of those works or pursuits that from their nature have to be performed in public, and that may, therefore, be offensive to the sensibilities of the Christian community in which they are carried on, if followed on the Lord's Day."³⁴

³² 27 Penn. St. 90 (1856).

³³ § 3565, Fla. Gen. St. 1906.

³⁴ *Hooks v. State*, 58 Fla. 57; 50 So. 586 (1909); citing 1 Page on Contracts, §§ 455, 456; *Bloom v. Richards*, 2 Ohio St. 387; *Johnson v. Brown*, 13 Kan. 529; *Horacek v. Keebler*, 5 Neb. 355; *Ray v. Catlett*, 12 B. Mon. (Ky.) 532; *Boynton v. Page*, 13 Wend. (N. Y.) 425; *Moore v. Murdock*, 26 Cal. 515; *Roberts v. Barnes*, 127 Mo. 405; 30 S. W. 113; 48 Am. St. Rep. 640; *Hellams v. Abercrombie*, 15 S. C. 110; 40 Am. Rep. 684; *Fitzgerald v. Andrews*, 15 Neb. 52; 17 N. W. 370.

Part III—Principal and Agent

CHAPTER XXIV

PRINCIPAL'S RELATIONS TO AGENT

§ 237. Principal May Employ Several Brokers (p. 250)

"Where the principal employs several agents as brokers, the sale of the land by one of the agents or the principal terminates the authority of them all, although notice of the sale may not have been given, and the principal will only be liable for a commission to the agent who was the procuring cause of the sale. If the brokers have no knowledge of the employment of others, the broker who was the procuring cause of the sale is entitled to his commissions, no matter if another broker or the principal takes up the matter and completes the sale.¹ A number of agents may have rendered service, such as finding a purchaser who otherwise would not have been found, and yet may fail to consummate a sale, and another may take it up and complete it, and the last one would be entitled to the commissions."²

So where property is placed in the hands of several brokers for the purpose of securing a tenant, the owner is ordinarily obligated to pay commissions only to the one who was the procuring cause of the lease.³

When sued by one broker, the principal may introduce proof to show that another broker brought about the sale or lease,⁴ and where the owner of property defends a broker's action on the ground that the broker was not the procuring cause, the owner may prove that he paid another broker the commission.⁵

Add to footnote 1 (p. 251):

Dalke v. Sivyver, 105 Pac. (Wash.) 1031 (1909); Baldino v. Henneberry, 191 Ill. App. 368 (1915); Smith v. Fowler, 57 Tex. Civ. App. 356; 122 S. W. 598 (1909).

¹Citing Clark & Sykes on Agency, § 779.

²Smith v. Fowler, 57 Tex. Civ. App. 356; 122 S. W. 598 (1909); Whitcomb v. Bacon, 179 Mass. 479; 49 N. E. 742; 64 Am. St. Rep. 317; Reynolds v. Tompkins, 23 W. Va. 235; Francis v. Eddy, 49 Minn. 447; 52 N. W. 43; Platt v. John, 9 Ind. App. 58; 36 N. E. 294; Scott v. Floyd, 19 Colo. 401; 35 Pac. 733; Ward v. Fletcher, 124 Mass. 224; Glascock v. Vanfleet, 100 Tenn. 603; 46 S. W. 449.

³Thorpe v. Cameron, 191 Ill. App. 455 (1915).

⁴Fredel v. Baldinger, 138 N. Y. Suppl. 147 (1912).

⁵Owcharoffsky v. Trustees of W. C. M. Church, 86 Misc. 36; 148 N. Y. Suppl. 138 (1914).

§ 239. Exclusive Agency (p. 251)

Add to footnote 10 (p. 252):

Snook v. Page (Cal. App.) 155 Pac. 107 (1915); Hill v. Horsley, 82 S. E. (Ga.) 225 (1914); Stallworth v. Martin, 87 S. E. (Ga.) 1094 (1916); Wright v. Waite, 126 Minn. 115; 148 N. W. 50 (1914).

§ 240. Intervention by Principal (p. 252)

Add to footnote 13:

Dalke v. Sivyver, 105 Pac. (Wash.) 1031 (1909).

§ 242. Rule when Broker's Efforts Fail (p. 253)

At end of § 242 (p. 254), add:

But the owner cannot escape payment of commissions by collusively arranging with the real purchaser, produced by the broker, to give the transaction the appearance of a purchase by some other person than the real purchaser.⁶

⁶Fifer v. Lewis, 183 Ill. App. 349 (1914).

CHAPTER XXV

AGENT'S RELATIONS TO PRINCIPAL

§ 249. Agent's Power to Make and Indorse Negotiable Paper (p. 258)

At end of § 249 (p. 259), add:

This case¹ was subsequently reversed because there was no evidence that the accomplishment of any act authorized by the power of attorney to the agent, necessitated the indorsement and transfer of a check, and that at the most, whether indorsement and transfer were necessitated by the acts authorized, was a question of fact. Where the power of attorney does not give express authority to indorse checks, the agent does not possess it unless it inheres in the authority expressly given to do other acts, and this is not the case unless it is reasonably necessary to effectuate the objects of the agency, and therefore within the intent of the principal, and it must appear clearly that the accomplishment of the acts expressly authorized required the exercise of the authority to indorse. "The express authority to receive negotiable paper does not imply the power to indorse it."²

¹*Porges v. U. S. Mtge. & Trust Co.* 203 N. Y. 181; 96 N. E. 424 (1911).

²Citing *Holtsinger v. National Corn Exchange Bank*, 1 Sweeny 64; affirmed by the Court of Appeals, 3 Alb. L. J. 305; *National City Bank of Brooklyn v. Westcott*, 118 N. Y. 468; *Rossiter v. Rossiter*, 8 Wend. 494; *Filley v. Gilman*, 2 J. & S. 339; *Jackson Paper Mfg. Co. v. Commercial Nat. Bank*, 199 Ill. 151.

CHAPTER XXVI

LIABILITY OF BROKER AND PRINCIPAL

§ 252. Misrepresentations by Brokers and Agents (p. 260)

The fact that in making false representations, the promissor is acting for others, may render his principals liable also, but gives him, the promissor, no immunity for the false representations that he made. If the promissor made the false representations with fraudulent design, and damage resulted from them to the person relying on the representations, the promissor is liable, though he may not have profited from them or had any interest in the deception, and although the fraud may have induced the promisee to contract with others as well as the promissor, and the fact that the promissor's false representations may not have been the sole inducing cause is immaterial.¹

§ 257. Fraud of Agent; Pleading (p. 265)

Add the following footnote:

See also §337.

¹Laska v. Harris, 215 N. Y. 554 (1915); Haener v. McKenzie 154 N. W. (Mich.) 59 (1915).

CHAPTER XXVII

LIABILITY OF PRINCIPAL TO THIRD PARTIES

§ 260. Liability of Principal for Agent's Wrongdoing (p. 267)

In *Williams v. Goldberg*,¹ the landlord was held liable for injuries sustained by a tenant from a falling ceiling, the tenant having complained of the condition of the ceiling and expressed the intention of vacating the premises, and the agent having represented that he had caused the ceiling to be examined and tested and that it had been found to be secure, when in fact no such test had been made.

§ 264. Notice to Agent as Notice to Principal (p. 270)

In *Jenkins v. Renfrow*,² the court quotes from Mechem on Agency, §721, as follows: "The law imputes to the principal, and charges him with all notice or knowledge relating to the subject matter of the agency, which the agent acquires or obtains while acting as such agent, and within the scope of his authority, or which he may previously have acquired, and which he then had in mind, or which he had acquired so recently as to reasonably warrant the assumption that he still retained it; provided, however, that such notice or knowledge will not be imputed: (1) where it is such as it is the agent's duty not to disclose, and (2) where the agent's relation to the subject matter, or his previous conduct, render it certain that he will not disclose it; and (3) where the person claiming the benefit of the notice, or those whom he represents, colluded with the agent to cheat or defraud the principal."

The failure of an agent to communicate to his principal information acquired by him in the course and within the scope of his agency is a breach of duty to his principal; but, as notice to the principal, it has the same effect as to third persons, as though his duty had been faithfully performed.³

"Undoubtedly a corporation is, in law, a person or entity entirely distinct from its stockholders and officers. It may have interest

¹ 58 Misc. 210; 109 N. Y. Suppl. 15 (1908).

² 66 S. E. (N. C.) 212 (1909).

³ *Jenkins v. Renfrow*, 66 S. E. (N. C.) 212 (1909); *Cox v. Pearce*, 112 N. Y. 637; 20 N. E. 566; 3 L. R. A. 563; *Saw Mfg. Co. v. Rutherford*, 64 S. E. (W. Va.) 444.

distinct from theirs. Their interest, it may be conceived, may be adverse to its interest, and hence has arisen against the presumption that their knowledge is its knowledge, the counter presumption that in transactions with it when their interest is adverse their knowledge will not be attributed to it. But while this presumption should be enforced to protect the corporation it should not be carried so far as to enable the corporation to become a means of fraud or a means to evade its responsibilities. A growing tendency is therefore exhibited in the courts, to look beyond the corporate form to the purpose of it and to the officers who are identified with that purpose."⁴

⁴*McCaskill Co. v. United States*, 216 U. S. 504; 30 Sup. Ct. 386 (1909); citing *Cook on Corporations*, §§ 663, 664, 727; *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417.

CHAPTER XXVIII

LIABILITY OF BROKER TO THIRD PARTIES

§ 271a. Personal Liability of Agent on Contracts (p. 280)

"In general, when a person acts and contracts avowedly as an agent of another, who is known as the principal, his acts and contracts, within the scope of his authority, are considered the acts and contracts of the principal, and involve no personal liability on the part of the agent."¹

While the contracts of an authorized agent acting on behalf of a known principal do not impose a personal liability upon the agent, yet an agent, though he be known to be such, may pledge his personal credit, for the party with whom he contracts may require it, and he himself may see fit to assume the obligation.²

§ 273. Liability of the Agent on Unauthorized Contract (p. 280)

"Whenever a party undertakes to do any act as the agent of another, if he does not possess any authority from the principal therefor, or if he exceeds the authority delegated to him, he will be personally liable to the person with whom he is dealing for or on account of his principal."³

"The rule as laid down by the great weight of authority, seems to be that where an agent undertakes to act for a principal without authority, or exceeds his authority, even though he in good faith, but erroneously, believes he has authority to act, he is responsible to the other contracting party for the damage he may sustain because of such want of authority."⁴

¹Roach v. Rutter, 105 Pac. (Mont.) 555 (1909).

²Jones v. Gould, 200 N. Y. 18; 92 N. E. 1071 (1910).

³Roach v. Rutter, *supra*; Kroeger v. Pitcairn, 101 Pa. 311; 47 Am. Rep. 718; Feeter v. Heath, 11 Wend. (N. Y.) 479; Charles v. Eschleman, 5 Colo. 107; Roberts v. Button, 14 Vt. 195; Meech v. Smith, 7 Wend. (N. Y.) 315; Myers T. Co. v. Keeley, 58 Mo. App. 491; Lewis v. Reed, 11 Ind. 239; Dale v. Donaldson L. Co., 48 Ark. 188; 2 S. W. 703; 3 Am. St. Rep. 224; Lawson v. Cobban, 38 Mont. 138; 99 Pac. 123.

⁴Roberts v. Tuttle, 105 Pac. (Utah) 916 (1909).

Part IV—Fraud

CHAPTER XXIX

WHAT CONSTITUTES FRAUD. ACTS NOT USUALLY CONSIDERED FRAUDULENT

§ 285. Promises, Hopes, etc. (p. 298)

A statement that an apartment house can be altered so that a larger income can be obtained from it is a mere expression of opinion, and not a fact which will serve as the foundation of a defense by a vendee to an action for the specific performance of a contract to purchase that it was induced by the false and fraudulent misrepresentation of a material fact.¹

Where, in a suit to cancel contracts for the purchase of real estate and to recover the amount paid thereunder, upon the ground that the defendant's agent falsely and fraudulently represented that he would, after one year, sell the property for the plaintiff at a profit of at least ten per cent, and there is no evidence that plaintiff was induced to sign the contract by reason thereof, the complaint should be dismissed. An agreement to sell property in the future as an inducement for one to purchase, does not constitute a fraud in the execution of the contract, in case of a failure to sell in the future. It is merely a breach of contract, and the remedy in an action for damages.²

In one case,³ it was said: "The present value of property depends upon what it will bring in the market, and whatever influences surround it, conditions adhere to it, or prospects attend it, that form a well-grounded belief in the minds of the public as to its value, impart a value to it. So that when a man who is familiar with real estate, as Johnson was, and engaged in the business of selling it, and assuming to have peculiar knowledge in relation to it, represents

¹*Petrie v. Cohen*, 74 Misc. 269, 131 N. Y. Suppl. 629 (1941); *affd.*, 158 App. Div. 899, 101 N. Y. Suppl. 1137.

²*Sensberg v. Park Terrace Co.*, 168 App. Div. 806, 154 N. Y. Suppl. 387 (1935).

³*Wicks v. London*, 91 Hun. 124, 70 N. Y. St. Rep. 945, 36 N. Y. Suppl. 1135; *affg.* *per curiam* 3 Misc. 106, 59 N. Y. St. Rep. 304, 28 N. Y. Suppl. 615 (1904).

to persons, living at a great distance, who have no opportunity to examine the property or ascertain the conditions that surround it, that its value is a certain amount, it ceases to be speculative and becomes an affirmation of fact. That is, a fact based upon his knowledge and experience and judgment, all of which he is supposed to marshal together as a basis of his statement as to the value. . . . If a man has a horse before him or a farm in sight which he is trying to sell, the purchaser being present and having an opportunity to judge of the exact value of any exaggerated statement he may make, he may be pardoned perhaps in the course of the trade and in the anxiety to make a good bargain for doing a little 'puffing'; but when he goes to a distant State and seeks persons who are entirely unacquainted with the property he seeks to sell, and who have to rely, and do rely, upon his word, he should indulge in no 'puffing,' no exaggeration, but simply tell the unvarnished truth in all particulars. Frauds of this character are entirely too common; they seem to increase with the growth of great cities and in the hot strife of booming localities, and they deserve condemnation whenever a clear case is established."

In another case,⁴ it was said: "It seems to be long-settled law in this State that false representations by a vendor as to value are not in themselves sufficient to support an action by the vendee for fraud.⁵ This rule is qualified to the extent that if the vendor resorted to a trick or artifice to prevent independent inquiry by the vendee, he will be held liable for fraudulent representations as to value.⁶ Again, if, with the representations as to value, the vendor make a false statement as to any extrinsic fact, which representation is false, and made with intent to deceive, then the vendee who relies upon it may have his action for fraud. . . .

"In the case at bar the vendee was solicited to visit the land; he did so; no artifice was practiced upon him to prevent inquiry; he did not form a favorable judgment of the offer to sell; he did not see profit in it for him as a speculation. The moving consideration of his purchase, according to his story, was the assurance of Narber that the property could be sold in the next spring at a profit. But this is not a statement of an existing fact, such as to take the case out of the general rule. Nor was the alleged statement of Narber that he could sell the property for the vendee before the mortgage came due, at a profit, a statement of an existing fact.

⁴*Meritas Realty Co. v. Farley*, 166 App. Div. 420; 151 N. Y. Suppl. 1052 (1915); reversing 85 Misc. 321; 147 N. Y. Suppl. 503.

⁵*Ellis v. Andrews*, 56 N. Y. 83; *Van Slochem v. Villard*, 207 N. Y. 587.

⁶*Simar v. Canaday*, 53 N. Y. 298.

Statements of this nature as to future events are deemed to be but speculatively promissory and do not constitute actionable deceit."

§ 286. Promises and False Representations (p. 299)

A representation which constitutes a promise to do something in the future, does not constitute fraud.⁷

After "Adams v. Gillig" cited on page 299, add:

Affirmed, 199 N. Y. 314; 92 N. E. 670 (1910).

§ 287. Opinions; Expressions of Value (p. 300)

"No action will lie for a false representation by the vendor concerning the value of the thing sold; it being deemed the folly of the purchaser to credit the assertion. And besides, value is matter of judgment and estimation, about which men may differ."⁸

There can be no recovery based on any representation, even though fraudulently made, with respect to the *value* of the property.⁹

§ 289. Opinions Amounting to Affirmations of Fact (p. 301)

That a misrepresentation of value is not fraud does not apply where the representations were intended to be taken as a fact, and the parties did not have equal opportunity to know the truth.¹⁰

Add to footnote 27 (p. 302):

Frankowski v. Knapp, 268 Ill. 183; 108 N. E. 1006 (1915).

§ 291. When Expression of Opinion Is Fraudulent (p. 303)

At end of § 291 (p. 304), add:

Where the value of the property is peculiarly within the knowledge of the person making the representations, and the relationship of the parties is such that the one imposed upon had the right to trust and confide in the statements of the other, the representations

⁷Creighton v. Campbell, 27 Colo. App. 120; 149 Pac. 448 (1915); Harriage v. Daley, 180 S. W. 333 (Ark. 1915); Ensign v. Lehmann, 192 Ill. App. 578 (1915).

⁸Van Epps v. Harrison, 5 Hill (N. Y.) 63 (1843).

⁹Mecum v. Mooyer, 166 App. Div. 793, 801; 152 N. Y. Suppl. 385 (1915); Van Slochem v. Villard, 207 N. Y. 587; 101 N. E. 467; Bennett Savgs. Bk. v. Smith, 152 N. W. (Iowa) 59 (1915); Buresh v. Seymour, 187 Ill. App. 295 (1915); Garrett v. Green, (Tex. Civ. App.) 164 S. W. 1105 (1914). Cf. Moon v. Benson (Ala. App.) 68 So. 589 (1915); Rodee v. Seaman, 145 N. W. (S. D.) 441 (1914).

¹⁰Van Vilet Co. v. Crowell, 149 N. W. (Iowa) 861 (1915).

as to value may properly be regarded as statements of fact and not merely an opinion.¹¹

And the inexperience of the one imposed upon, and the relationship of the parties, may even excuse the complainant in failing to make further inquiry into the matter.¹²

¹¹Murphy v. Murphy, 78 Misc. 178; 137 N. Y. Suppl. 872 (1912); citing Simar v. Canaday, 53 N. Y. 298; 13 Am. Rep. 523; Daiker v. Strelinger, 28 App. Div. 220; 50 N. Y. Suppl. 1074.

¹²Murphy v. Murphy, *supra*, citing Eaton v. Avery, 83 N. Y. 31; 38 Am. Rep. 389; Clark v. Rankin, 46 Barb. (N. Y.) 570; 20 Cyc. 126; Hall v. Perkins, 3 Wend. 627.

CHAPTER XXX

WHAT CONSTITUTES FRAUD. ACTS USUALLY CONSIDERED FRAUDULENT

§ 293. Representation That Certain Price Had Been Offered (p. 305)

Add to footnote 2:

Hull v. Doheny, 152 N. W. (Wisc.) 417 (1915).

§ 294. Representation as to Value and Price Paid for Property (p. 306)

✓ A misrepresentation as to the actual cost of the property is a material fact and naturally calculated to mislead the purchaser.¹

§ 295. Representations as to Rentals (p. 307)

A guaranty of a certain rental for premises has been held to be merely contractual and as not amounting to a representation that the property was then renting for the sums specified.²

Add to footnote 10:

Thaler v. Nieder-Meyer, 185 Mo. App. 257; 170 S. W. 378 (1915);
Jacoby v. Hollada, 138 Pac. (Wash.) 558 (1914). See also §285.

§ 297. Representations as to Situation of Property (p. 308)

Where a seller of agricultural land represented that it was high and dry, good agricultural land without mire, swamp, or boggy portions, such representation was a material representation of fact, and not mere seller's talk for which he could not be held responsible.³

§ 300. Representations as to Title of Vendor (p. 309)

But merely representing that a certain title is good, the statement being qualified by adding that another named person would not otherwise have taken a mortgage on the land, indicates that the representation is a mere opinion.⁴

¹Sandford v. Handy, 23 Wend. (N. Y.) 260 (1840).

²Holmes v. Coalson (Tex. Civ. App.) 178 S. W. 629 (1915).

³Haener v. McKenzie, 154 N. W. (Mich.) 59 (1915).

⁴Stacey v. Robinson (Mo. App.) 168 S. W. 261 (1914).

CHAPTER XXXI

NEGLIGENCE ON PART OF VENDEE

§ 307. Negligence No Bar to Relief in Cases of Wilful Fraud (p. 316)

An echo of an early New York real estate boom is found in an old case, wherein it was said: "It will seem marvellous, if not wholly incredible, to those who did not live in the years 1835 and 6, that men should purchase lands lying within ten hours' ride of their residence, and agree to pay \$32,000 without ever having taken the trouble to look at the property either in person or by an agent. But farms lying in the vicinity of cities and villages were then so much in demand for the building of new towns, that many persons thought it best not to hazard the loss of a bargain by stopping to look or inquire, when they could purchase at a thousand dollars per acre. They might better lose the little sum of \$32,000 than be absent one whole day from Wall street, and thus miss the possible chance of purchasing the site of some other prospective city of much greater magnitude. Wonderful as it may seem to the next generation, such things did happen."¹

In that case² the defendant, claiming to have been the victim of misrepresentations, offered to prove that he knew nothing about the land, except it lay on the opposite side of the river from the city of Albany. Says the court, "He trusted to the representations of the plaintiff (who sued on a bond given for the purchase money) in relation to the condition of the property, and the only question is, whether the defendant must charge the loss upon his own folly, and the madness of the times, or whether the plaintiff has done such a wrong as may be redressed by action. The credulity of the defendant furnishes but a poor excuse for the falsehood and fraud of the plaintiff, and the latter will have no just ground for complaint if he is held responsible for his misconduct."

¹Van Epps v. Harrison, 5 Hill (N. Y.) 63 (1843).

²*Id.*

CHAPTER XXXII

WAIVER. RESCISSION. REMEDIES

§ 309. Waiver of the Fraud (p. 318)

It is possible that, after having been induced to purchase by fraud and deceit, a person not only may elect to retain the property, but also to waive his right of action for damages.¹

"The mere fact, however, of affirming or ratifying the contract by deciding to retain its fruits, as distinguished from approving of the fraud and deceit and waiving any right to redress on account thereof is insufficient to show a waiver of the cause of action for damages."²

§ 310. What Constitutes Waiver of Fraud (p. 319)

If a person, induced by fraud to purchase and agree to pay for real estate, subsequently, with full knowledge of the facts, treats it as his own and authorizes his vendor to act as agent for the sale thereof, he thereby ratifies the transaction and will be remitted to his action for damages.³

§ 317. Offer to Restore (p. 324)

"In contracts of sale which have been fully executed on the part of the vendor by the delivery or conveyance of the thing sold, no fraud on his part in making the contract can operate as a complete bar to an action for the price, unless the thing sold was absolutely worthless, or the vendee has returned or reconveyed the property on the discovery of the fraud. When sued for the price, the vendee may, in general, recoup damages; but while he retains the property he cannot treat the contract as wholly void and refuse to pay anything. By retaining the property, he affirms the validity of the contract, and can be entitled to nothing more than the damages which he has sustained by reason of the fraud."⁴

¹*Potts v. Lambie*, 138 App. Div. 144; 122 N. Y. Suppl. 935 (1910); *Cooley on Torts* (3d Ed.) 965; *Prvor v. Foster*, 130 N. Y. 171; *People v. Stephens*, 71 N. Y. 527; *St. John v. Hendrickson*, 81 Ind. 350. See also *Cain v. Dickenson*, 60 N. H. 371; *New York Land Improvement Co. v. Chapman*, 118 N. Y. 288; *Barr v. N. Y. L. E. & W. R. R. Co.*, 125 N. Y. 263.

²*Potts v. Lambie*, *supra*.

³Syllabus by the court in *Hammond v. Patterson*, 123 N. W. (Neb.) 304 (1909).

⁴*Van Epps v. Harrison*, 5 Hill (N. Y.) 63 (1843).

§ 319. Pleading Fraud Committed by More Than One
(p. 324)

"The gist of the action attempted to be pleaded is fraud. The charge of conspiracy is only important to connect all of the defendants with the transaction and to charge each with the acts and declarations of the others."⁵

⁵Lee v. Brown, 139 App. Div. 669; 124 N. Y. Suppl. 204 (1910).

Part V—Procedure

CHAPTER XXXIV

PLEADING

§ 331. Pleading the Facts Constituting the Cause of Action (p. 333)

The broker cannot set up in his complaint one cause of action and recover on another, against the objection of the defendant, and without amendment of his complaint.¹ This is, of course, merely in accordance with the fundamental rule that a judgment shall be *secundum allegata et probata*.²

§ 333. Facts to be Stated (p. 335)

A complaint in an action for broker's commissions failing to allege non-payment of an earned commission, or an indebtedness for same, does not contain the "plain and concise statement of the facts constituting each cause of action" required by subdivision 2 of § 481 of the New York Code of Civil Procedure, where the other averments thereof are not equivalent to an allegation of non-payment.³

In *Mott v. Minor*,⁴ it seems to be suggested that the complaint should allege that the broker's authority continued till the time when his purchaser was secured, or at least that it should inferentially so appear from the complaint and that otherwise the complaint would be fatally defective, and consequently the revocation of the broker's authority is provable under a general denial and without being set up as a defense. This because the rule is that "any facts which tend to disprove some one of the material allegations of the complaint may be given in evidence under the denial."

Add to footnote 19:

The complaint must allege employment. *Hevia v. Wheelock*, 155 App. Div. 387; 140 N. Y. Suppl. 351 (1913).

It is competent for the plaintiff in such action to show an employment by an agent under an allegation of employment by the defendant, because the act of the agent is the act of the principal. *Cannon v. Bannon*, 151 App. Div. 693; 136 N. Y. Suppl. 139 (1912). See also § 337.

¹*Silvert v. Kommel*, 138 App. Div. 229; 122 N. Y. Suppl. 846 (1910).

²*Bryant v. Ayres*, 190 Ill. App. 499.

³*Reis Co. v. Post*, 162 App. Div. 463; 147 N. Y. Suppl. 845 (1914).

⁴(Cal. App.) 106 Pac. 244 (1909).

Add to footnote 27:

First Nat. Bk. v. Story, 200 N. Y. 346; 93 N. E. 940 (1911).

Add to footnote 28:

First Nat. Bk. v. Story, *supra*.

§ 334. Full Performance and Excuse for Performance (p. 337)

On page 338, after "a complete sale"³⁹, add:

"A real estate broker negotiating a sale of land for a person who agreed with him, in writing, to convey it to the intending purchaser, from whom he was to receive his commission, may maintain an action for breach of contract upon refusal of such person to convey, upon showing that the purchaser was ready to take and pay therefor.

"In such case the measure of plaintiff's damages is the amount he would have received as commission from the intending purchaser, had defendant complied with his contract."⁵

§ 335. Pleading Special Agreements (p. 338)

Where the complaint alleges a contract of employment to sell only at a specific price and the performance of that contract, while the evidence wholly fails to establish it, a non-suit is proper.⁶

A complaint in a broker's action for commissions setting out a contract whereby the broker was entitled to commissions "upon passing of title as agreed," fails to state a cause of action where it is not alleged that the title passed, or that it failed to pass by reason of some fault on the part of the defendant.⁷

§ 336a. Bill of Particulars (p. 340)

A bill of particulars of a broker's claim may be had, especially where the principal denies having employed the broker, it having been held that the rule is well settled that where a party is without information concerning a contract alleged to have been made, or other negotiations or proceedings alleged to have been had or taken by him through an agent, he is entitled to a bill of particulars giving the name of the agent, and specifying the time and place, and to a copy of any contract or other writing.⁸

⁵Atkinson v. Pack, 114 N. C. 597; 19 S. E. 628; Robinson v. Oklahoma F. I. Co., 155 Pac. (Okla.) 202 (1916).

⁶Moloney v. Brennan, 138 App. Div. 510; 123 N. Y. Suppl. 375 (1910).

⁷Reis Co. v. Zimmerli, 155 App. Div. 260; 140 N. Y. Suppl. 3 (1913).

⁸Astor Mortgage Company v. Tenney, 157 App. Div. 361; 142 N. Y. Suppl. 265 (1913).

Where the complaint in a broker's action for commissions is not based upon the fair value of the services but upon a specific contract entitling him to a certain percentage of the aggregate rentals to be received by his principal, the plaintiff will not be required to give a bill of particulars stating the amount of time used by him in procuring the lease, as that is immaterial.⁹

§ 336b. Preference of Broker's Action on Trial Calendar (p. 340)

Naturally, the broker usually desires a speedy trial of his action for commissions. In localities where trial calendars are overcrowded with litigation, and delays result, either code provisions or local rules give preference to certain classes of cases. Actions for work, labor, and services are frequently so preferred, and it has been sought to place in that category broker's actions for commissions.

In one case, in commenting upon a local preference calendar rule, it was said:

"This action, by broker for commissions on sale of land, is sought to be advanced under Kings County Calendar Rule 10. Formerly this rule preferred 'any action on contract,' which clause was stricken out in 1909. After seeking to have the cause preferred by the calendar clerk as an action on contract (which the clerk refused), plaintiff now moves to prefer the cause as 'for work, labor and services,' within Rule 10 as amended. This language usually means ordinary employment analogous to 'wages, salary or compensation for services,' as used in the corresponding Calendar Rule V in the First Department. The rule giving preference over other suitors should not have a broad construction, but rather should be limited to the ordinary import of this language, which primarily designates labor claims.¹⁰ It not being shown that actions for brokers' commissions have been so preferred under the work and wages preference, either in the First or Second Departments, the present application is denied."¹¹

In another case, the appellate division of the same court held that an action for broker's commissions was entitled to preference on the calendar under the same rule above mentioned.¹²

⁹*Fragner v. Fischel*, 141 App. Div. 869; 126 N. Y. Suppl. 478 (1910).

¹⁰*Bristor v. Smith*, 22 Misc. 55, approved in 158 N. Y. 157.

¹¹*St. John v. Kloppenberg*, 46 N. Y. Law Journal, 360 (Oct. 24, 1911).

¹²*Sprague v. Tangiers Dev. Co.*, 152 App. Div. 921; 137 N. Y. Suppl. 746 (1912).

§ 337. Pleading Acts Done by Agent (p. 340)

While acts and contracts may be stated according to their legal effect, it has been asserted that an act or promise by a principal (other than a corporation), if in fact proceeding from an agent known to the pleader, should be so stated.¹³

¹³Conn. Practice Book, §144.

CHAPTER XXXV

INTERPLEADER

§ 345. **Requisites of Interpleader** (p. 351)

In the ordinary case of rival brokers claiming a commission, interpleader is proper, but not so where the employer has, by his conduct, left himself open to liability to both rival brokers. Where the owner or lessor in the ordinary way submitted his property to several brokers for sale or for rental, the owner is not responsible for the fact that two brokers undertook negotiations with the same prospective purchaser or lessee, especially where each of the brokers knows that the other is endeavoring to interest the same prospective purchaser or tenant. Where the owner or lessor admits his liability to either one of the two brokers, he may be released upon the payment of the money into court and interpleading the adverse claimant.¹

But the defendant is not entitled to an order of interpleader merely because two claims are made against him for the same debt, but the two claims must be of such a nature that he cannot determine the validity of the claims without hazard. In this sense, the making or withholding of the order rests within the sound discretion of the court.²

And so, on a motion for interpleader, it is not enough to show that a claim is made against the vendor by another broker for payment of an amount of money equal to the sum claimed by the broker who sues the vendor for the commission. It should be shown that the broker who also claims the commission has some foundation for his claim, and that the vendor cannot determine without risk to whom the commission should be paid. A mere assertion of a claim is not enough to sustain an order of interpleader. It should also be shown that the two different brokers claiming the commission are not claiming under separate agreements.³

Where, in an action for interpleader brought under § 820a of the New York Code of Civil Procedure, the complaint follows the requirements of said section, but nothing whatever is stated either in the complaint or the affidavits showing the basis of the claims of

¹*Fox v. Cammeyer*, 93 Misc. 180; 156 N. Y. Suppl. 1046 (1916).

²*Mitchell v. Catlin Co.*, 71 Misc., 450; 128 N. Y. Suppl. 692 (1911).

³*Cross v. Ludin Realty Co.*, 90 Misc. 606; 154 N. Y. Suppl. 26 (1915); *Gonia v. O'Brien*, 223 Mass. 177; 111 N. E. 787 (1915).

the defendants beyond the mere statement that they all assert claims and have made demands upon the plaintiff, the plaintiff's motion for leave to pay into court should be denied. "It is necessary to sustain an action of interpleader or a motion under the Code to show that the alleged claims have, or in case of a motion the claim of a third person has, some reasonable basis on which to rest. While it has never been held that it is necessary to sustain an interpleader to show that a claimant will probably succeed in establishing his claim, a mere assertion of claim by another without alleging anything whatever on which to base it is not enough." Although it may not be necessary in such action that the complaint should state the facts tending to show that the conflicting claims to the fund rest upon a reasonable basis, such facts should be set forth by affidavit upon the motion for leave to pay into court.⁴

In *Smith v. Fowler*,⁵ a case in which the owner brought the commission into court because of conflicting claims thereto, it was said, "No one attacked or denied his (the owner's) right to interplead the different claimants in the lower court, and, if there was any force or strength in the contention that an interpleader should not have been allowed, the matter cannot be raised for the first time in this court."

⁴*Sulzberger v. Seklir*, 153 App. Div. 749; 138 N. Y. Suppl. 691 (1912).

⁵ 57 Tex. Civ. App. 356; 122 S. W. 598 (1909).

Part VII—Schedules and Forms

CHAPTER XXXIX

FORMS OF CONTRACTS FOR SALE OF REAL ESTATE

Form 17—Contract of Sale. New York City (p. 398)

To clause (p. 400) stating that gas fixtures, etc., pass with sale, add: "storm sash and storm doors."

CHAPTER XL

MISCELLANEOUS FORMS

Form 36a—Exclusive Agency Agreement (p. 427)

To.....
Brooklyn, N. Y.....19.....

I HEREBY GRANT YOU, for a period of.....months from this date, and thereafter until this agreement is revoked by notice in writing delivered to you, the exclusive right to sell the property hereinafter described; and in consideration of your accepting said agency and advertising and endeavoring to sell said property, I hereby agree to pay you as a commission all in excess of the price hereinafter fixed, if a purchaser is procured ready, able, and willing to enter into a contract upon the terms named or upon any other terms which I shall accept, and if I or any other agent shall sell the same, I will pay you a commission of 1% on the sale price.

Said property is known as No.....
 in the Borough of Brooklyn, City of New York.....feet in width in
 front and rear by.....feet in depth on the.....side of
 avenue
street.....feet.....of.....
 upon which there is erected.....

The price is \$.....payable as follows:

\$.....when contract of sale is signed; \$.....by the pur-
 chaser taking said property subject to a mortgage for that amount, due
bearing interest at.....% per annum, payable

\$.....by the purchaser giving me a purchase money mortgage for
 that amount, due.....bearing interest at.....% per annum, payable

\$.....in cash or certified check when deed is delivered.

I agree to enter into a formal contract of sale with the purchaser
 allowing him.....days to close title and containing the
 usual clauses and covenants.

Singular pronouns of the first person shall be read as plural when
 this agreement is signed by two or more persons.

Witness:

.....(L.S.)
(L.S.)

Accepted:

.....(L.S.)

Form 40a—Acceptance of Mortgage Application; Gen- eral New York Title Companies' Form; Personal Liability of Applicant (p. 432)

Dated.....

Amount \$.....	Interest.....%	Fees	\$.....
1. Applicant		Conveyancing ..	\$.....
Address		Recording Fees..	\$.....
2. Insure		Mortgage Tax...	\$.....
Address		Survey	\$.....
3. Title of fee in.....		Additional papers	\$.....
4. Title of mortgage in.....		.....	\$.....
5. Name of wife or husband.....			
6. Premises		Total	\$.....
.....			
7. Existing mortgages.....			to be paid to remain
8. Mortgagee's name and address.....			
9. To be reported.....	191	To close.....	191

10. Close at office of.....No..... M.
11. Papers to be drawn.....
(In case of mortgages state amount, maturity, rate of interest, and any special clauses.)
12. Remarks, encumbrances, and other details, if any.....
13. Papers left with company.....
(Space may here be left for diagram of the property, if diagram is desirable in addition to or in place of above reference to the premises.)

The undersigned hereby personally employs the..... Company, to examine, according to its system, the title to the premises above mentioned, and in consideration for the credit extended to him personally, the applicant personally agrees to pay said company, the fees above mentioned, together with all sums expended or disbursed by said company for recording or filing fees and also the Company's regular charges for surveys and the preparation of papers.

The statements made on this memorandum are correct and true to the best of the belief of the undersigned. If the undersigned before the closing of the title should have any further information or intimation as to defects, objections, liens, or encumbrances affecting said premises, the same will at once be fully made known to the Company. The Company shall have the right to decline to approve the title for any reason deemed sufficient by any of its officers, its solicitor or an assistant solicitor, or one of its counsel, and the undersigned agrees to pay said fees and disbursements whether the title is accepted or declined. This agreement is in no way conditional or dependent upon a loan being made.¹

Form 43a—Agreement for Compensation for Loan² (p. 436)

Jones and Smith, brokers (or attorneys), having secured the acceptance of the above (or within) loan from a client, I (or we) hereby agree to pay them the sum of \$.....for having secured such acceptance, and for examining or procuring the examination or guarantee of the title to said lands, drawing and recording papers, mortgage tax, survey and all disbursements; and I further agree to pay them said sum if the money is not actually advanced because of defects in the title (or in case they decide that the title is not satisfactory).

¹See authorities under § 191, *supra*.

²The above form may be printed or written at the foot or on the back of any of the foregoing applications for loans. This form, by using the last clause in parenthesis, may be made quite advantageous to the broker or attorney procuring the loan. (See sec. 191; see also form of New York City title companies. Form 40a.)

INDEX TO SUPPLEMENT

(References are to pages.)

A

- Abstract of title,**
 - broker can impose obligation to give, 21
 - broker cannot impose obligation to give, 21, 46
- Acceptance of mortgage application, Forms, 15**
- Accounting for commissions,**
 - between several brokers, 28
- Advertising by broker, 42**
 - untrue and misleading, is criminal offense in New York, 43
- Amount of commissions,**
 - all in excess of fixed price, 80, 81
 - custom, 81
 - in absence of agreement or custom, 81
 - on failure of parties to carry out exchange contract, 80
 - promises to pay increased commission, 80
- Appraisals, compensation for, 32**
- Arizona, authority to sell or purchase, 19**
- Attorneys at law acting as brokers, 12**
- Authority of broker,**
 - oral modification of written, 17
 - revocation of (See "Revocation of broker's authority")
 - to employ other brokers, 28
 - to make and endorse negotiable paper, 95
 - to sign contract, 20, 21
 - when required to be in writing, 17-19
- Availability of purchaser,**
 - who is ready, willing, and able, 52, 53

B

- Bill of particulars, 109**
- Broker, (See also "Insurance broker")**
 - acting for both sides (See "Double employment")
 - act in own interest presumed to be injurious to principal, 26
 - act in own interest voidable, 26

Broker—Continued

- may not act also as principal, 25
 - except perhaps when minimum price is fixed, 26
- may not make secret profit, 25
- who may act as, 11

C

- California**, authority to purchase or sell, 18
- Catalogue** (See "Advertising by broker")
- Change of mind by vendor**, 53
- Chicago**, ordinances requiring license, 12
- Collusion as to identity of broker**, 93
- Commissions**, (See also "Exchange of property"; "Liability for commissions"; "Loans"; "Leases")
 - amount of, 80, 81
 - instalment sales, commissions on, 85, 86
 - invalid agreements to wait for, 83
 - Sunday sales, 87-92
 - valid agreements to wait for, 84, 85
 - when due, 83
- Compensation**, (See also "Commissions")
 - for appraisal, 32
 - for loan agreement, Forms, 116
- Completeness of transaction**,
 - optional contract is not, 57
- Conspiracy** (See "Fraud")
- Consummation of sale by principal**, 43
- Contingent commission agreements**, 85
- Contract of sale**,
 - Forms, 114
 - naming broker in, effect of, 39
 - Sunday, 92
- Corporations**,
 - liability for commissions, 73, 75
 - notice to agent is notice to principal, 97
- Credit**, broker has no general authority to extend, 46
- Custom** (See "Amount of commissions")

D

- Defective title**, as cause of failure of deal, 58
- Deferred commissions**, agreements to wait for commissions, 83-85
- Double employment**,
 - how question raised, 24
 - is breach of contract, 22
 - rule applies to exchange, 22
 - where broker has no discretion, 23
 - with knowledge of both sides, 23

E**Employment,**

- by purchase, vendor to pay commissions, 37
- manner of, 37
- of one broker by another, 28 (See also "Several brokers")
- volunteers, 37

Exchange of property,

- authority to sell does not imply authority to exchange, 62
- double employment, 22
- when commissions are earned, 62
- when contract of exchange is not performed, commissions, 62, 63, 80

Exclusive agency, 94

- agreement for, Forms, 114

Executors, liability for commissions, 72**Expert testimony, compensation for, 32****F****Failure of broker's efforts,**

- because of defective title, 58
- through fault of customer, 60
- through fault of principal, 58, 59
- through misrepresentation of seller, 61

Fees of title companies, who is liable for, 72**Financial ability of purchaser,**

- burden of proof as to, 56
- when need not be shown, 54

Fraud,

- as to price offered, 104
- as to price paid, 104
- as to rentals, 104
- as to situation of property, 104
- as to title of vendor, 104
- as to value, 100-102
- negligence no bar to relief, 105
- offer to restore, 106
- opinions ordinarily not, 102
- opinions, when fraud, 102, 103
- pleading fraudulent conspiracy, 107
- promises, hopes, etc., 100, 102
- promises to re-sell, 100
- promises to sell in future, 100
- waiver of, 106

G**Good faith,**

- in exchange of property, 63
- refusal of broker to disclose information, 51
- what is lack of, 48-50
- when lack of, must be pleaded, 48

Guardians, liability for commissions, 72**H****Husband and wife, liability for commissions, 71, 72****I****Increased commissions, promise to pay, 80****Indiana, authority to sell, 19****Instalment sales, commissions on, 85, 86****Insurance broker,**

- authority of, 31
- is agent for whom, 30, 31
- liability of, 31
- license of, 15
- when cannot insure himself, 31

Interpleader, requisites of, 112, 113**L****Labor law, liability of renting agent for violation of, 29, 30****Leases,**

- naming broker in, effect of, 39
- renewal of lease, commissions on, 69
- requirements as to earned commission, 68
- sale of leasehold, commissions on, 70
- when broker's obligations are performed, 68, 69

Liability for commissions,

- corporations, 73, 74
- employer ordinarily liable, 71
- husband and wife, 71, 72
- person not owning the property, 71
- purchaser, 75-79
- trustees, executors, and guardians, 72

Liability of broker,

- on contracts, 99
- on unauthorized contracts, 99

Liability of insurance broker, 31**Liability of principal,**

- for broker's misrepresentations, 96 (See also "Misrepresentation")
- for negligence of agent, 97

License,

- Chicago ordinances as to, 12
- of insurance brokers, 15
- to act as broker, 12-15

Loans,

- acceptance of, Forms, 117
- agreement for compensation for procuring, Forms, 118
- amount of commissions on, 66, 67
- commissions on, New York rule, 64, 65
- defects as cause of failure to loan, 66

M

Minimum price, right of broker to buy at, 26

Misrepresentations, (See also "Fraud")

- as to identity of purchaser, 94
- as to rents, 60
- by broker, who liable for, 96
- by purchaser as to who is procuring cause, 79

Missouri, authority to sell need not be written, 18

Modification, oral, of written authority, 17

Mortgage application, acceptance of, Forms, 115

N

Negligence,

- liability of principal for agent's, 97
- no bar to relief for fraud, 105

New Jersey, authority to sell or exchange, 18

Notice to agent, as notice to principal, 97

Notifying principal, that customer is broker's client, 42

O

Option, procuring, does not ordinarily entitle broker to commission,
53, 57

Oregon, authority to sell or purchase, 18

P

Performance, pleading, 109

Pleading,

- acts done by agent, 111
- facts to be stated, 108
- performance, 109

Preference on trial calendar, 110

Previous sale, revocation of broker's authority, 34, 93

Principal,

- collusion with purchaser, that another party was purchaser, 94
- consummation of sale by, 43
- intervention by, 94
- may employ several brokers, 93
- relations of agent to, 95
- relations of, to agent, 93, 94

Procuring cause,

- advertising, 42
- broker must be, 38
- effort required of broker, 40
- general rule as to, 39
- misrepresentations of purchaser as to who is procuring cause, 79
- notifying principal of customer, 42
- presence of broker, 41
- unsuccessful efforts, 40
- when broker is, 38

Profits, secret, broker may not make, 25, 27**Promises to pay commissions,**

- effect of, 39
- increased commissions, 80

Public officials acting as brokers, 11**Purchaser,**

- employment of broker by, vendor to pay commissions, 37
- financial ability of, 54, 56
- mere "paper offer" is not sufficient, 40
- when liable for commissions, 75-79

R**Ready, willing, and able** (See "Availability of purchaser"; "Completeness of transaction"; "Exchange of property"; "Failure of broker's efforts"; "Financial ability of purchaser"; "Leases"; "Loans"; "Option"; "Purchaser")**Relations of agent to principal, 95****Relations of principal to agent, 93, 94****Rentals, misrepresentations as to, 104****Renting agent,**

- liability of, for violation of Labor Law, 29, 30

Resale, promise as to, 100**Rescission in case of fraud, 106****Revocation of broker's authority,**

- after lapse of reasonable time, 33
- by mutual consent, 33
- by previous sale, 34, 93
- must be in good faith, 34

S

- Secret profits**, broker may not make, 25, 27
Several brokers, (See also "Authority of broker"; "Employment"; "Interpleader")
 commissions on lease, 68, 69
 principal liable to broker who is procuring cause, 93
 proof permissible as to whom commissions were paid, 93
 respective rights of, 35
 sale by one terminates authority of others, 93
Signing contracts of sale, authority of broker, 20, 21
Sunday sales, commissions on, 87-92

T

- Tax on right to act as broker**, 12
Termination of broker's authority, (See also "Revocation")
 sale by one broker, terminates authority of others, 93
Terms of sale,
 cannot be changed after acceptance, 44
 performance at seller's house or place of business, 46
 principal's terms must be met, 44, 45
Testimony, expert, compensation for, 32
Trial calendar, preference on, 110
Trustees, liability for commissions, 72

V

- Value**, fraud as to, 100-102

W

- Washington**, authority to sell or purchase, 18
Written authority of broker, 17-19

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